No. 12150

United States
Court of Appeals
for the Ninth Circuit

CALIFORNIA ASSOCIATION OF EMPLOYERS, a California Corporation doing business under the firm name and style of RENO EMPLOYERS COUNCIL,

Appellant,

vs.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF RENO, NEVADA AND VICINITY, et al., and NATIONAL LABOR RELATIONS BOARD,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Nevada

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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For the Appellee. [1*]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States of America in and for the District of Nevada

Civil Action, No. 700

CALIFORNIA ASSOCIATION OF EMPLOYERS, a California Corporation, doing business under the firm name and style of RENO EMPLOYERS COUNCIL,

Petitioner,

vs.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF RENO, NEVADA AND VICINITY, HOD CARRIERS BUILDING AND COMMON LABORERS LOCAL UNION No. 169, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION No. 1242, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION No. 971, LOCAL UNION OF OPERATING ENGINEERS No. 3, OPERATIVE PLASTERERS AND CEMENT FINISHERS LOCAL UNION No. 241, BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION No. 118 OF SACRAMENTO, CALIFORNIA, ELECTRICAL WORKERS LOCAL UNION No. 401, PAINTERS, DECORATORS AND PAPERHANGERS LOCAL UNION No. 567, BOILER MAKERS, IRON SHIP BUILDERS AND HELPERS LOCAL UNION No. 94, BRICKLAYERS, MASONS AND PLASTERERS LOCAL UNION No. 6, JOURNEYMEN PLUMBERS AND STEAM FITTERS LOCAL UNION No. 350, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS UNION No. 224, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION No. 26, ELEVATOR CONSTRUCTORS LOCAL UNION No. 401, WOOD, WIRE AND METAL LATHERS LOCAL UNION No. 208, BLACKSMITHS, DROP FORGERS AND HELPERS LOCAL UNION No. 158, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL No. 533.

COMPLAINT

Comes now your petitioner and for a cause of action for a declaratory judgment respectfully shows: [2]

I.

That the California Association of Employers, is a corporation, organized under the laws of the State of California; that said corporation is qualified to do business in the State of Nevada, and for a number of years last past and immediately prior to the filing of this petition, said corporation was engaged in business in the State of Nevada and doing business under the fictitious name of Reno Employers Council, having its principal place of business in the City of Reno, State of Nevada. That the respondent, the Building and Construction Trades Council of Reno, Nevada, is an organization with various labor unions as its affiliates, in the Counties of Washoe, Storey, Ormsby, Douglas, Lyon, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka, in the State of Nevada, and these unions have jurisdiction over working conditions in construction work in counties in some of the northeastern part of the State of California. That said Building and Construction Trade Union affiliates being the other respondents herein named are affiliated with the American Federation of Labor. That the respondent Union, Ornamental Iron Workers Union No. 118 is a California Union carrying on negotiations in respect to collective bargaining with employers in Building and Construction industry in northeastern California and in western Nevada by and through respondent Building and Construction Trades Council of Reno, Nevada.

II.

That on the 24th day of May, 1947, the petitioner and the Building and Construction Trade Council of Reno, Nevada, [3] entered into a master industry collective bargaining contract wherein petitioner was party of the first part and the Building and Construction Trades Council of Reno, Nevada, and vicinity, by and in behalf of its affiliates and other respondents herein, were parties of the second part, wherein the respective parties did agree for a period from the 24th day of May, 1947, to and including the 21st day of May, 1948, to operate their employee-employer relationship in respect to the matter of union security and other working conditions, which said master contract is appended to this petition as Exhibit "A," and expressly made a part hereof.

That thereafter and after the execution of the master agreement aforesaid the following respondent union, to-wit: United Slate, Tile and Composition Roofers, Damp and Waterproof Association, Local No. 224, Plumbers and Steam Fitters Union, Local 350, Hod Carriers, Building and Common Laborers Local Union No. 169, United Brotherhood of Carpenters and Joiners of America Local Union 971, Painters, Decorators and Paperhangers Local Union Number 567, United Brotherhood of Carpenters and Joiners of America Local Union No. 2142, Sheet Metal Workers' International Association, Local Union No. 26, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 533, did each append thereto as a part of Exhibit "A" a stipula-

tion wherein each of said respondent unions adopted the conditions of the said master agreement.

III.

That this action arises under the Constitution of the United States, Article 1, Section 8, Clause 3; the Act of Congress 49 Stat. 449, USC., Title 29 Secs. 151-166, popularly [4] known as "The National Labor Relations Act," as amended by the Act of Congress 61 Stat. 1 36, USC., Title 29 Secs. 151-197 popularly known as the "Labor Management Relations Act of 1947, as hereinafter more fully appears. The matter in controversy exceeds exclusive of interest, the sum of three thousand dollars.

IV.

That prior to entering into the master agreement under date of May 24, 1947, appended hereto as Exhibit "A," the said Reno Employers Council did act for and on behalf of the following members: Ready-Mix Concrete Co., A. P. Eveleth Lumber Co., Flanigan Whse. Co., Reno Mercantile Co., ber and Coal Co., Consolidated Warehouse Co., Commercial Hardware Company, Crane Company of Nevada, Home Lumber Company of Nevada, Peterson-McCaslin Lumber Co., Paul Bunyan Lumber Co., Flanigan Whse. Co., Reno Marcantile Co., J. R. Bradley & Co., Morrison-Merril & Co., all of whom are Building Material Dealers, E. Billi, C. N. Blabon, Walker-Boudwin Construction Co., Mervin Gardner Co., Hancock and Hancock, Frank Hensley, Ed Lee, Linville Construction Co., Fred C. Mathews, O. & O. Novelty Co., G. Panicari, J. Wat-

kings, Weill Construction Co., Weichman and Probasco, Paul C. Williams all of whom are Contractors, George Warren Co., and Yancey Company each of whom are Roofers, Molten & Fitch, Anderson & Landucci, Lyle Smith, Ben Bowles Co., Herbert V. Smith Electrical Co., Linnecke Electric Co., Sparks Electric Co., Enterprise Electric Co., Hankin Bros., All Electric Co. of Sparks, Electric Service Co., George Day Electric Co. of Sparks, Tom Wright Electric Co., Harold Deck, Leo Likes, all of whom are Electrical Contractors, Harold Tamka, Mervin Gardner, Camil Solari & Sons, Leo Anima, [5] Lyle Ball, Bill Avery, Elmer Rowe, J. A. Heywood, Tom Johnson, Julius Caselli, Paul Barnes, Jes B. Beskwys, C. H. Balz, Truman A. Jones, Tom Cox, Ed Stauts, Tom Stauts, R. C. Graham, C. E. Springer, J. W. Byassee, Andrew Solari, George Len all of whom are Painting Contractors, National Coal Company, Union Ice Company of Nevada, Reno Press Brick Co., Reno Fuel Co., Heating Air Conditioning Supply Co., Saviens Electrical Products Co., Stevens Heating & Supply Co., all of whom are Oil-Burner Refrigeration Contractors and Sheet Metal Workers, Builders Mill Inc., A. T. Eveleth Co., Paul Bunyan Lumber Co., Home Lumber Co. of Nevada, Jess Watkins Lumber Co., all of whom are Milling Industry Members, Savage & Son, Inc., J. C. Creveling Plumbing & Heating Co., Clark Plumbing & Heating, Louis Dickens, Liberty Plumbing Co., Heating and Air Conditioning Supply Co., Tom Ivers, Nevada Plumbing & Heating Co., Vernon Segale, Saviers & Sons, Inc., Albany Plumbing Company, United

Refrigeration Co., Sierra Appliance Co., all Plumber Industry Members. That each of said members did then and there, and prior to the execution of said contract, authorize the Reno Employers Council as its bargaining agent to enter into said contract for and on behalf of the members thereof. That each of said members is in turn engaged in interstate commerce. That the industry represented by petitioners' members does buy, sell, process and construct structures commonly known to the construction industry in the States of California and Nevada; that a majority of said members of petitioner are licensed to do business and are doing business in California and Nevada, and do transact such business under said licenses in said states. That the major portion of the products bought and sold by the material dealers, members of petitioner, [6] originate from without the States of California and Nevada. That many of said petitioner's members employ and transport their employees among both states aforesaid in perusal of their business. That the members of the Reno Employers Council represent the vast majority of firms supplying materials and doing construction work in the northwestern part of the State of Nevada and in the northeastern part of the State of California, and in the State of Nevada, and elsewhere. That the business of the members aforesaid, and the materials used therein depends upon the uninterrupted free flow of interstate commerce.

V.

That pursuant to the master contract aforesaid respondents did notify applicant on the 15th day of

March, 1948, that they desired to negotiate terms and conditions in regard to the changes or modifications mentioned in said written notice, which said notice is hereto annexed, marked Exhibit "B" and expressly made a part hereof. That immediately thereafter and in good faith, negotiations were undertaken. That it was the opinion of the Reno Employers Council after advise given by legal counsel, that the Labor Management Relations Act of 1947 prevented the continuation of the master agreement beyond May 21, 1948, without a revision of the union security provision of said contract as required by said Labor Management Relations Act of 1947, Whereupon petitioner did notify the unions and the Council, respondents herein, that in its opinion the respective unions should immediately take steps to comply with the Labor Management Relations Act of 1947 by filing the necessary petitions so that proper elections should be held prior to May 21, 1948, for the purpose of securing proper authority to request union security provision in their working agreement. [7] That thereafter and during said negotiations your petitioner took the position in such negotiations that the master agreement could not be continued after the date, May 21, 1948, without compliance with Section 8 A I of the Labor Management Relations Act of 1947, the same being Chapter 120, Public Law 101, which requires an election and affirmative vote of the employees on the question whether union membership be made a condition of employment. That your petitioner is informed and believes and therefore alleges the fact to be that a collective bargaining

agreement entered into between your petitioner and respondents without compliance with said Labor Management Relations Act of 1947 by respondents first accomplished would amount to a conspiracy to defeat the purpose of the act aforesaid and would therefore subject petitioner and respondents to civil and criminal liability. That being fully advised of the position of petitioner, the respondents did affirmatively during negotiation and in particular on the 18th day of May, 1948, address a communication in writing to the Reno Employers Council, hereto annexed marked Exhibit "C" wherein they advised that they recognized the Labor Management of Relations Act of 1947, as "The law of the land," but that it was their belief that the Reno Building Trades Council and the construction industry in the area of California and Nevada aforesaid was not covered by the provisions of said Act and advised petitioners that until feasible procedures for elections were established by the National Labor Relations Board and a Court of competent jurisdiction had ruled the industry to be covered that the only basis of any further negotiations would only be upon the condition of the maintenance of the so-called union security clause or closed-shop provision which presently contained in the Master agreement, Exhibit "A" and as provided for in other separate agreements between petitioners and [8] respondents. Whereupon your petitioner did address a communication in writing to respondent, Reno Building Trades Council a copy of which said communication is hereto annexed and marked Exhibit "D." That thereupon

all negotiations between applicant and respondents did terminate.

That during the negotiations aforesaid and in an endeavor in good faith to ascertain the answer to the foregoing justicable question and controversy, your petition did communicate with Robert N. Denham, General Council for the National Labor Relations Board in Washington, D. C., on the 26th day of March, 1948, requesting from him a construction of whether or not the provisions and circumstances of and surrounding the master agreement were such as to bring the building and construction industry in the area within which members of your petitioner do business under the terms of the Labor Management Relations Act of 1947, a copy of which letter is hereto annexed and marked Exhibit "E." That in reply the said Honorable Robert N. Denham did advise your petitioner that the problem enclosed in the inquiry of your petitioner was a controversial one which doubtless will be sometime subject to a board or court decision and one in which he felt he was not authorized to give an opinion. A copy of said reply is hereto annexed marked Exhibit "F."

VI.

That in the past all collective bargaining agreements in the Building and Construction industry, and in particular those between petitioner and respondents have always contained a closed shop provision, or as sometimes denominated "union referral slip method" under which your petitioner is informed and believes and therefore alleges the fact to be, no individual or employee is permitted

to be hired under Exhibit "A" or any [9] of the separate agreements aforesaid unless said employee did possess and exhibit to the employer a slip, certifying in effect that said employee was a member of the proper affiliated union and/or recommended by said union to the employer. That the continuation of said condition aforesaid referred to as the "union security clause" or "closed shop" provision of the master contract would be in direct violation of Section 7 of the Labor Management Relations Act of 1947, the same being a Federal Statute.

VII.

That your petitioner is informed and believes and therefore alleges the fact to be that respondents will not negotiate or bargain upon any other assumption than that they are not covered by the provisions of the Labor Management Relations Act of 1947 and that they have determined that they will not comply with the provisions of Section 8 A 3 of said Act; that your petitioner is informed and believes and therefore alleges the fact to be that the position of respondents whereby they have contended throughout their negotiations that they are not covered by said Labor Management Relations Act of 1947 is not in good faith, but is a subterfuge for the purpose of coercing the petitioner into complying with the original demands for an amendment to said agreement under the master agreement, particularly in regard to wages for the reason that throughout the entire negotiations aforesaid repsondents have made the same wage demands, and it is therefore the belief of your

petitioner that said collective bargaining has not been in good faith on the part of respondents, and is merely a subterfuge to compel the petitioner and its members to meet such increased wage demands or to be subjected to economic coercion by reason of [10] strikes, slow downs and other tactics normally employed by such unions under such circumstances.

VIII.

That the respondents, United Brotherhood of Carpenters and Joiners of America, Local Union Number 1242, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Number 533 agree with petitioners and have moved to comply with the Labor Management Relations Act of 1947 to accomplish a proper election upon the question of the union security provisions aforesaid, and are made party respondents herein for the sole purpose of obtaining an adjudication of all of the rights of the respective parties to the master contract aforesaid.

IX.

That before further negotiations or any collective bargaining in good faith, or otherwise, between the parties hereto can be accomplished, the question, whether or not the Federal Labor Management Relations Act of 1947 covers and governs in the premises must be determined prior to the termination of the master agreement aforesaid; that said master agreement will terminate at midnight May 21st, 1948; that at the time of the filing of this complaint a declaratory judgment could be secured which

would terminate the controversy and permit orderly negotiations of the controversies involved; that there is insufficient time available within which the Court can fix a time for the determination of the justicable controversy alleged before such termination and that therefore unless a temporary restraining order is issued upon the allegations and prayer of this verified petition, said master contract and other contracts alleged herein will so expire; that unless such temporary [11] restraining order is issued the said master agreement will expire, renewal thereof or substitution therefore will be precluded and the entire industry over the area stated in California and Nevada will be thrown into a management-employee relation condition amounting to chaos until the entry of the declaratory judgment herein prayed for. That any interruption of the status quo of the parties hereto will interfere with the free flow of interstate commerce by reason of the interruption of the buying, selling, transportation of lumber, paints and other materials, and labor between the States of California, Nevada and others by reason of slow-downs, strikes and other forms of coercion which your petitioners are informed and believe and therefore avers to be the fact that said respondents will employ immediately upon the termination of the master agreement and other contracts in the event that petitioners do not meet thedemands of respondents contained in their letter of May 18th, 1948; That your petitioner is informed and believes and therefore alleges the fact to be that this is a case of first impression in the District Court of the United

States of America and that unless the temporary restraining order herein prayed for is granted by this Court, the issue will become moot and the contractual relationship between petitioners and respondents cease before this Court has had time to consider and determine the jurisdiction of this Court to entertain this cause between these parties. That for the foregoing reasons the damages resulting to the petitioner and the public will be irreparable and there is no adequate remedy at law or otherwise for the maintenance of the status quo, other than by the issuance of a temporary restraining order to prevent any such coercive action on the part of respondents until such time as this Court renders its declaratory judgment [12] affirming or denying the coverage afforded by the Labor Management Relations Act of 1947 to the areas, persons and industries covered by the master agreement aforesaid and other agreements aforesaid.

X.

That your petitioner does not contest or object to the fact that respondents are the proper, recognized bargaining agents for the employees in the aforesaid industry for the purpose of negotiating and bargaining for hours, wages and working conditions, but that said petitioner does contend that respondents have not complied with the Labor Management Relations Act of 1947 in respect to having had the proper elections authorizing said bargaining agents of respondents herein to negotiate and contract for a union security clause in any collective bargaining contract arrived at after ne-

gotiation with petitioner; that in the event this Court finds the aforesaid construction industry to be governed by the Labor Management Relations Act of 1947 then and in that event the petitioners allege that at the date of this petition, said respondents are qualified under said act to collectively bargain respecting wages and hours, but are not qualified to bargain in respect to any such collective bargaining agreement containing a union security provision, but in the event this Court should hold that the Labor Management Relations Act of 1947 does cover the industry represented by petitioners as agents and representative, then and in that event petitioner upon information and belief alleges the fact to be that any further collective bargaining negotiations on the part of respondents will contain an ultimatum to the effect that any wage agreement arrived at in the future irrespective of the action taken by respondents in respect to qualifying or not [13] qualifying or by eliminating from the negotiation the union security provision is to be retroactive in effect from the 21st day of May, 1948, that in such event the negotiations will amount to a failure on the part of respondents to bargain collectively in good faith.

Wherefore, Petitioner prays judgment as follows:

1. That respondents be required to answer and set forth their contentions in regard to the controversies presented in this petition;

2. That this Court by its declaratory judgment declare and decree whether or not the Labor Management Relations Act of 1947 governs and con-

trols any collective bargaining agreement between the parties hereto, particularly under Exhibit "A" hereof.

3. That this Court enter a temporary restraining order against respondents restraining them from using coercion of any kind to prevent the maintenance of the status quo until a declaratory judgment as herein prayed for can be rendered by this Court; and that after due notice to respondents the Court enter its preliminary injunction to the same effect;

4. That in the event this Court finds that the Labor Management Relations Act of 1947 controls and governs the collective bargaining of the parties hereto that this Court order that any agreement arrived at by the parties hereto thereafter in respect to wages shall date from the date such agreement shall be entered into and shall in no event become retroactive from that day to May 21st, 1948.

5. That this cause, when at issue, be set for trial at the earliest possible date, to have preference over all other cases, excepting older matters of the same character and matters to which special precedence may otherwise be given by law.

6. For such other further and general relief as the Court [14] may deem meet and proper in the premises.

7. For their costs of suit therein expended.

/s/ BROWN & WELLS,
Attorneys for Petitioner.

United States of America,
State of Nevada,
County of Washoe—ss.

Winston M. Caldwell, being duly sworn on behalf of the petitioner corporation in the above entitled action says:

That he is the president of said corporation; that he has read the foregoing complaint and petition, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matter that he believes it to be true.

/s/ WINSTON M. CALDWELL.

Subscribed and Sworn to before me this 21st day of May, 1948.

(Seal) /s/ ROBERT W. WELLS,
Notary Public in and for the County of Washoe, State of Nevada.

My Commission Expires: August 20, 1950. [15]

EXHIBIT "A"
December 8, 1947

Supplement to the Building and Construction Master Agreement

The following is a supplement to the Building and Construction Master Agreement entered into between the parties this date and said provisions of this supplement to expire May 21, 1948.

Separability Clause:

The provisions of this agreement are deemed to be separable to the extent that if and when a court

of competent jurisdiction adjudges any provision of this agreement in its application between the union and the undersigned employer to be in conflict with any law such decision shall not affect the validity of the remaining provisions of this agreement but such remaining provisions shall continue in full force and effect, provided further, that in the event any provision or provisions are so declared to be in conflict with a law, both parties shall meet immediately or as soon as practicable for the purpose of renegotiating an agreement on provision or provisions so invalidated.

In Witness Whereof, the parties hereto have set their hands and seal this 8th day of December, 1947.

BUILDING TRADES COUNCIL OF RENO,
By /s/ HARRY A. DEPAOLI.

RENO EMPLOYERS COUNCIL,
By /s/ ROY B. FLIPPIN. [16]

MASTER AGREEMENT

This Agreement made and entered into by and between the Reno Employers Council for and on behalf of the General Contractors, Sub-Contractors, who have signified their approval thereof by the attached authorization attached hereto, and hereinafter referred to as the Employer and the Building and Construction Trades Council of Reno, Nevada, and vicinity, and its various affiliates for the counties of Washoe, Storey, Ormsby, Lyon, Douglas, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka Coun-

ties, all affiliated with the American Federation of Labor, who except for themselves, and for their various crafts councils and for their various local Unions, which have jurisdiction over the work in the territory hereinabove described, hereinafter referred to as the Union.

Each local Union authorizing the acceptance of this agreement does so by attaching a stipulation to that effect, signed by its duly elected officers, which will be attached hereto, and becomes a part hereof.

Witnesseth: In consideration of the premises and of the respective promises, agreements, and covenants of the said parties signatory hereto, do hereby mutually agree as follows: [17]

Witnesseth

Definitions:

The Term "Employer" as used herein shall refer to the persons, firms, copartnerships, or corporations or association who are members recognized by the State Contractors Board of Nevada, and who are signatory to this Agreement.

The Term "Union" as used herein shall refer to the labor organizations signatory to this Agreement and to all members of the said labor organizations.

This Agreement shall apply to any employee who performs work falling within the recognized jurisdiction of the Union.

Jurisdiction:

The Building and construction Trades Council of Reno is recognized as the exclusive representative

for collective bargaining of the employer's employees covered by this Agreement.

This Agreement covers all work within the jurisdiction of the Unions signatory hereto as recognized by the Building and Construction Trades Department of the American Federation of Labor and performed in the Counties of Washoe, Storey, Ormsby, Lyon, Douglas, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka, all in the State of Nevada.

This Agreement will in no way conflict with any of the by-laws or their provisions of any local union affiliated with the Reno Building Trades Council, nor will be construed to mean that a subcontractor cannot sign an Agreement with a local union, of whose workers he employes, nor will it supersede any local Agreement now in full force and effect.

Employment Clearance:

The Employer shall call upon the Union and employ in the performance of work within the jurisdiction of the Union only qualified members in good standing and properly cleared by said Union, and that, upon the execution of this Agreement, all of the present employees of the contractor not members of the Union shall become members of the Union; said workmen shall make application for membership in said Union immediately after the execution of this Agreement and all such applications for membership shall be received and accepted by the Union upon terms and qualifications not more burdensome (as to the initiation fees or

dues, or otherwise) than those applicable at such time to other applicants to such Union. They shall, however, upon the execution of this agreement be immediately cleared by the Union to the job classification under which they are employed.

It is further agreed that when craftsmen covered by this agreement are required, the Employer shall call upon the Union to supply such craftsmen, but when a shortage of craftsmen exists, and they cannot be supplied by the Union, the Employer may employ craftsmen who are sasitfactory to the Employer; provided that such craftsmen so desired shall be properly cleared through the Union as above indicated.

This agreement shall not apply to Executives, Superintendents, Assistant Superintendents, General Foremen or Civil Engineers and their helpers, Timekeepers, Messenger Boys, Guards, Confidential Employees and Office Help. All foremen and subforemen shall be members of their respective union.

Show Up Time:

Any employee shall be notified at least two hours before being required to report for work. When possible, the Employer shall notify the employee the night prior to the day upon which he is required to work. An employee shall keep the employer advised at all times of his correct address and telephone number. In the event an employee is instructed to report for work and does report for such work, but is not given any work, he shall be paid according to the by-laws of the craft affected.

Union Activity:

No employee shall be discharged or discriminated against for activity in, or representing a Union. No employee shall suffer discharge without just cause, provided, however, the employer shall be the sole judge of the qualifications of his employees and provided further that the Union shall be the sole judge of the qualifications of the employee for membership in the Union. [18]

In the event that the employee is discharged without just cause, he may be reinstated with payment for time lost. In the event of a dispute, the existence or non-existence of "just cause" shall be determined as provided under "Settlement of Disputes" of this Agreement.

Higher Wages:

No employee receiving a higher rate of pay shall suffer a reduction of pay by reason of the execution of this Agreement.

Bonds:

No employee shall be required by Employer to deposit a cash bond with his Employer or any other person. The Employer shall pay the premium upon all required surety bonds.

Settlement of Disputes:

The individual Unions shall appoint a working employee as a steward on each job, whose duty it shall be to receive all grievances or disputes from employees, and adjust them immediately with the Superintendent in charge of the job or other employer's representatives. Stewards shall not be discriminated against in any manner by the employer

or his agents because of, or on account of, his activities in presenting and adjusting grievances of disputes. It is recognized by the Employer that it is desirable that the person appointed steward remain on the job as long as there is work in the particular craft or trade of the steward.

In the event that grievances, disputes or controversies cannot be settled between signatores to this agreement, a Board of Arbitration shall be created for the settlement of such grievances, controversies or disputes. It shall be composed of not more than six (6) representatives selected by the Building and Construction Trades Council, and not more than (6) representatives selected by the Employer, and these (2) groups shall select a disinterested party immediately, who shall have no business or financial connection with either party, the disinterested party shall serve as chairman and shall adopt rules of procedure which shall bind the contracting parties. The decision of said Board shall be rendered by a majority of its members and shall be rendered within forty-eight (48) hours after submission. Said decision shall be final and binding on both parties. Pending such decision, work shall be continued in accordance with the provisions of this contract. The expense of employing said seventh person shall be borne equally by both parties. Any grievance arising under the terms of this agreement must be submitted in writing either by the Union or the Employer to the Board of Arbitration within 30 days of the date upon which the grievance is alleged to have occurred. Complaints

not filed within 30 days shall be invalidated and there shall be no right of appeal by either party involved.

Application to Sub-Contractors:

The terms and conditions of the Agreement insofar as it affects Employer shall apply to any subcontractor under the control of, or working under contract with Employer upon work covered by this Agreement and said sub-contractor with respect to such work shall be considered as an Employer.

Conflicting Contracts:

Any oral or written agreement between an Employer and an individual employee who is a member of Union, which conflicts or is inconsistent with, this Agreement or any supplemental agreements hereto, which dis-establishes or tends to disestablish relationship of employer and employee, or establishes a relationship other than that of employer and employee, shall forthwith terminate.

Any oral or written agreement between an Employer and an individual employee who is not a member of Union, which conflicts or is inconsistent with, this Agreement or any supplemental agreement hereto, which dis-establishes or tends to disestablish relationship of employer and employee, or establishes a relationship other than that of employer and employee, shall terminate upon such employee's admission into membership in Union.

No oral or written agreement which conflicts, or is inconsistent with, this agreement or any supplemental agreements thereto, shall hereafter be en-

tered into by and between Employer and any individual employee performing work within the recognized jurisdiction of Unions.

Elimination of Restrictions of Production:

No rules, customs or practices shall be permitted that limit production, or increase the time required to do any work. There shall be no limitation or restriction [19] of the use of machinery, tools or other labor-saving devices, save and except the use of spray painting equipment in general construction.

Cooperation With Employer's Safety Measures:

The Unions shall cooperate (1) with the Employer and with each other in the carrying out of all Employer's safety measures and practices for accident prevention and (2) employees shall perform their duties in each operation in such a manner as to promote efficient operation of each particular duty of any job as a whole. The contractors signatory to this agreement shall carry Nevada Industrial Insurance.

Jurisdictional Disputes:

There shall be no cessation or interference in any way with any of the work of Employer by reason of jurisdictional disputes between the various A. F. of L. Unions with respect to jurisdiction over any of the work covered by this agreement. Such disputes shall be settled by the Unions themselves in accordance with the laws of the Building and Construction Trades Department of the American Federation of Labor.

Apprentice Training:

That the Contractors and the Unions recognize the need for apprentice training and to this end the apprentices in each of the trades employed shall be in full conformity with the provisions of the Federal Apprentice Training Program governing employment of apprentices upon any and all work coming under the jurisdiction of the Reno Building Trades Council and its affiliated unions.

Continuous Operations:

This Agreement shall not prevent the General Contractors for negotiating or making agreements with Unions signatory to this Agreement with respect to projects which require continuous operations and over which said Unions possess jurisdiction and any existing agreements of such nature shall not be affected hereby.

Holidays:

Holidays are New Year's Day, Memorial Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving Day and Christmas Day. Holidays falling on Sunday will be observed on the following Monday. All Saturday, Sunday and Holiday work shall be paid for at the overtime rate of the craft involved.

Wage Scales Apply to Classifications:

The Contractor agrees that the wage scales shall be recognized to applying to classifications rather than to employees; that any employee performing work shall be paid at the rate the classification his work calls for. In the event that it becomes necessary for the employee to work at more than one

classification within the craft in any one day, the employee shall receive the rate of pay of the highest paid classification.

Travel Allowances and Subsistence:

When the By-Laws and Working Rules of International, National or Local Unions in effect on the date of the execution or renewal of this Agreement require travel allowances to be paid, allowances will be paid in accordance therewith for the craft affected.

Working Rules: Building Construction:

1. Eight (8) consecutive hours between 8 AM and 5 PM shall constitute a day's work at straight time except in those crafts where a shorter work day prevails and on shift work.

2. The work week shall be Monday, 8 AM through Friday, 5 PM. All overtime worked before or in excess of these hours shall be paid for at the overtime rate of the craft involved.

3. When so elected by the Contractor, men may be worked on a shift basis provided the signatory Unions are notified, when possible, twenty-four (24) hours in advance of the effective date of the starting of such shift. When employees are required to work on a shift basis they shall be paid and shall work as designated by the Unions affected. It is agreed that the straight time shift work may run from 12:01 AM Monday to Midnight Friday. That eight (8) hours of work will constitute the work day of each shift, except that more than one shift may be worked in accordance with the working rules of the crafts involved. [20]

Other Unions:

(a) That services of members of Unions other than those listed in the Agreement, and on whose behalf this Agreement is executed by the signators, shall be performed by the members of the said Unions according to the terms of the Agreement, and according to the wages and working rules that are established at the date of execution of this agreement by said local Unions.

(b) Nothing herein shall prohibit Unions other than those listed in the Agreement from negotiating and executing changes in wage scales or working conditions not in conflict with any of the provisions of this Agreement.

(c) Any changes in such wage scales (attached hereto and made a part hereof) or working rules must be made in the manner provided by the By-laws and Constitutions of the respective Unions and then only upon 30 days' notice to the contractors and with provision for completing, at existing wage scales and working rules all work which is in progress or upon which bids have been submitted or committments made 30 days or more prior to the effective date of this change.

(d) All work involving these other Unions upon which bids have been submitted or committments made shall be registered with the Building and Construction Trades Council, described in the Agreement, within 15 days after notice of change in wage scales and working conditions and work commenced on these registered jobs not later than 30 days after date of registration.

Unions Will File By-Laws, Etc.

The Unions shall immediately after execution of this agreement file with the General Contractors, signatory to this agreement, certified copies of their constitutions, by-laws, wage scales and working rules.

Effective and Termination Date:

This agreement shall remain in effect for a period from May 24, 1947, to and including May 21, 1948, and shall continue to remain in full force and effect thereafter, except as to wages and hours, which may be subject to change or modification by a thirty (30) day notice being served in writing by either party upon the other party for a desired change in this Agreement. Following the giving of such notice, the parties shall proceed to negotiate as to the changes or modifications mentioned in the written notice, the contract remaining in full force and effective at all times until the conclusion of negotiations and an agreement upon any changes or modifications. Following such agreement, a supplement to this Agreement shall be entered into and executed by the parties which supplement shall designate the changes which have been agreed upon, and except as to such changes, this Agreement shall remain in full force and effect unchanged. The above clause (the 30-day clause) to be used only once during the contract year——.

Both parties hereby agree to abide by all sections of the above Agreement.

If any Section or part thereof of this agreement is found to be in violation of any State or Federal law it would not invalidate the balance of the agreement.

In Witness Whereof, the parties hereto have hereunto set their hands and seals by their respective officers thereunto duly authorized.

This 21st day of May, 1947.

ALL LOCAL UNIONS
LISTINGS,

/s/ HARRY A. DEPAOLI,
Pres. Nev. State Fed. of Labor, Representing Reno Bldg. Trades Council and vicinity;

CONTRACTORS LISTING,

/s/ ROY B. FLIPPIN,
Representing General and/or Independent Contractors.

STIPULATION

We the duly authorized officers of the Hod Carriers, Building and Common Laborers Local Union Number 169, an affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Reno Employers Council. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into be-

tween the General Building Contractors of Reno and Local 169.

Wage scale to be $1.30 per hour, effective May 24, 1947.

HOD CARRIERS, BUILDING AND COMMON LABORERS LOCAL UNION NO. 169,

/s/ BERT P. McGUIRE,

/s/ ROBERT GAUSSI. [22]

STIPULATION

We the duly authorized officers of the Painters, Decorators and Paperhangers Local Union Number 567, an affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Painting Contractors. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into between the Painting Contractors of Reno and Local 567.

Wage scale to be $17.00 per day for eight (8) hours. $2.00 per hour for seven (7) hours, $3.00 per hour for one (1) hour.

To be effective May 27, 1947, to run to May 21, 1948.

PAINTERS, DECORATORS AND PAPERHANGERS LOCAL UNION NUMBER 567,

A. O. McGINTY,

Pres. [23]

STIPULATION

We, the duly authorized officers of the Plumbers & Steam Fitters, Local Union Number 350, an affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Plumbing and Steam Fitting Contractors. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into between the Plumbing and Steam Fitting Contractors of Reno and Local No. 350.

The wage scale to be $2.25 per hour effective May 28, 1947, and to run to May 21, 1948.

PLUMBERS AND STEAM FITTERS
UNION, LOCAL 350,

/s/ SIDNEY DALTON. [24]

STIPULATION

We the duly authorized officers of the Plumbers & Steam Fitters, Local Union Number 350, an affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Oil Burner & Refrigeration Contractors. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union

and/or the working agreement entered into between the Oil Burner & Refrigeration Contractors of Reno and Local 350.

The Wage Scale to be $2.25 per hour effective May 28, 1947, and to run to May 21st, 1948.

PLUMBERS AND STEAM FITTERS UNION, LOCAL NUMBER 350,

/s/ C. C. TARNER,

/s/ SIDNEY DALTON. [25]

STIPULATION

We the duly authorized officers of the United Slate, Tile and Composition Roofers, Damp and Waterproof Association, Local No. 224, an affiiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Reno Employers Council. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into between the Roofing Contractors of Reno and Local 224.

UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF ASSOCIATION, LOCAL NO. 224,

/s/ HAROLD VAN GILDER. [26]

STIPULATION

We the duly authorized officers of the United Brotherhood of Carpenters & Joiners of America Local Union No. 971, an Affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the General Contractors. It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into between the General Building Contractors of Reno and Local No. 971.

The wage scale to be $2.00 per hour.

Effective May 26, 1947. To run to May 21, 1948.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA LOCAL UNION 971,

/s/ J. N. BYARS,
/s/ ERNIE M. REYNOLDS,
/s/ MARK HESSEE,
/s PAUL CRAFTON,
/s/ LOUIS PALEY;

FOR THE INDEPENDENT AND/OR GENERAL CONTRACTORS:

/s/ ROY B. FLIPPIN,

/s/ STERLING BUILDERS, INC.,

By C. W. BAKER. [27]

EXHIBIT "B"

March 17, 1948

Employer's Council
Byington Building
Reno, Nevada

Gentlemen:

At the last regular meeting of the Building Trades Council of Reno and Vicinity, held under date of March 5, I was instructed to communicate with your honorable Body and request the following.

It is our desire to open negotiations on the Master Agreement in order to bring about certain changes which will make our Agreement in accordance with the provisions of the Taft-Hartley Act.

It has been brought to our attention that our Agreement is not now in full accordance with the provisions of the above noted Act, which will necessitate the changes which we desire to effect.

We sincerely hope that your Council will be favorable to our request.

Very truly yours,

(Seal) /s/ R. GAUSSI,
Secretary-Treasurer. [28]

EXHIBIT "C"

Building Trades Council of
Reno and Vicinity

440 North Virginia Street, Reno, Nevada

May 18, 1948

Reno Employer's Council
Byington Building
Reno, Nevada

Gentlemen:

This communication will serve to confirm our verbal discussion with your Honorable Body concerning the position of the Reno Building Trades Council with regard to its Master Agreement and the provisions contained therein.

It is a recognized fact that the Taft-Hartley Act is a recognized Law of the land—being duly passed by the Congress of this United States, however, it should be further considered that it be the sense of the Reno Building Trades Council that the construction industry is not covered by the Taft Hartley Act, that there has been no feasible procedure for elections set up by the National Labor Relations Board for on-the-Job construction elections now being held in Pennsylvania near Pittsburgh and in Michigan around Detroit acceptable procedures of elections for on-the-job Construction Industry, and that in any event, the National Labor Relations Board, through General Counsel Denham, has advised that it is unable to hold elections at the present time or give any definite information as to when they will be held in our State, or under what

procedure, and it is our contention that the contractors and unions can not be held in Violation of the Act, even though charged with unfair labor practices until:

(a) It is determined by the courts that we are covered by the Act, and

(b) Until feasible procedures for elections are established by the Board, and

That it still further be the sense of the Reno Building Trades Council that a uniform policy of negotiating or renegotiating collective bargaining agreements for the Construction Industry on the job shall be to negotiate agreements which, if they contained a "no-strike" and/or "arbitration" clause, shall also contain our present "union security" clause (not the so-called union security clause in the Taft-Hartley Act), which will permit us to continue the practice of working on a union basis without jeopardizing our rights to strike; Failing to negotiate on the above basis, the alternate procedure shall be to eliminate all three of these clauses and related clauses from the agreements in the future, which leaves only posted wages, hours and working conditions. [29]

It shall be further construed as a Statement of Policy that we shall negotiate wages, classifications and working conditions and continue to negotiate the administrative terms of the agreement until:

(a) Feasible procedures for elections are established by the National Labor Relations Board acceptable to the unions, and

(b) Further decisions are rendered on the question of Intra-Interstate Status.

Further proposals submitted by the Reno Building Trades Council are as follows:

That the original proposal on the wages (twenty-five cents per hour increase) and hours as submitted to you shall apply to the following Crafts: Carpenters; Electricians; Painters; Plumbers and Roofers;

The wage scale as previously submitted by the Laborer's Local Union Number 169 shall carry the increase rate of twenty-five cents per hour above the present rate, namely, that of one dollar and thirty cents per hour;

The Reno Building Trades Council agrees not to negotiate the wage scale of the Sheet Metal Workers Local Union Number 26 of Reno, Nevada, however, at the same time, we waive no rights or privileges which might impair the rights of the above noted Local Union to negotiate their own wages, hours and conditions or any other provisions of their present contract.

You may be assured that the Reno Building Trades Council will be more than willing to further negotiate or consider any counter proposals which your organization may wish to offer.

Looking forward to receiving a prompt and favorable reply, we remain,

Respectfully,

RENO BUILDING TRADES COUNCIL,

By /s/ D. W. EVERETT,
Chairman, Negotiations Committee.

DWE/gm [30]

EXHIBIT "D"

March 26, 1948

Robert N. Denham, General Counsel
National Labor Relations Board
Washington, D. C.

Dear Sir:

We are addressing this memorandum to you for the purpose of securing immediate instructions and advice on what steps are necessary to renew a Master Agreement covering the Building Trades Industry in Reno and surrounding counties.

The Parties to Agreement

The American Federation of Labor Building and Construction Trades Unions of Reno, Nevada, and vicinity and its affiliates for the counties of Washoe, Storey, Ormsby, Lyon, Douglas, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka Counties, has in its membership all Building Trades Unions which have jurisdiction over construction work in the territories hereinabove described, and

The Reno Employers Council is an affiliate of the California Association of Employers and is a nonprofit employers association formed for the purpose of representing employers in their labor relations. The Reno Employers Council has as one of its members the Independent Contractors Association of Reno as well as a majority of all other contractors and subcontractors and suppliers of building materials within Washoe County and surrounding areas.

Historical Background

Prior to 1947 the Building Trades and Construction Industry operated with individual working agreements. In May, 1947, a Master Agreement between the Reno Employers Council, for and on behalf of its members, and the Building Trades Council of Reno, for and on behalf of its affiliated Unions, entered into a Master Agreement. A copy of this Agreement (Exhibit 1) is attached hereto, together with the individual stipulations which identify the various Unions and establish the job classifications and wage rates of each individual Union.

The parties to the Master Agreement are desirous of complying with all laws and regulations which might be applicable. With this in mind, informal conferences have been held to explore what revisions will be necessary to meet the requirements of the National Labor Relations Act of 1947. Legal counsel has been retained by both parties and conflicting interpretations have been the result.

We have before us the NLRB Release R-39 (February 11, 1948), as found in CCH P. 8466 as well as NLRB Release R-48 (March 10) CCH P, 8469. Because of the opinions expressed in these two releases and the conflicting legal advice we have received, the parties to the Agreement have agreed to abide by your decision on the procedure to be followed so that we might continue the Master Agreement between us and be in full compliance.

Your attention is called to those Sections of the Agreement dealing with Union security. As you already know, the Building Trades have historically

operated under a closed shop security provision. The question now before us is whether it will be necessary for the parties to the Master Agreement to follow the procedures outlined in your Release No. R-38, i.e. necessity of U. A. election, if reopening notices are filed by the Unions on wages only.

It will be noted that the anniversary date of the Master Agreement is May 21, 1948, and the contract has no specific termination date.

We are desirous of having an opinion from you as to what procedure must be followed. Time is of the essence. The sixty-day reopening notices have been issued but proposals have not been submitted. It is the desire of all parties to maintain the harmonious relationships that have existed between the parties in the past and this can only be done by the continuation of a Master Agreement, which complies with all the requirements of Federal Law.

Respectfully submitted,

RENO EMPLOYERS COUNCIL,
W. M. CALDWELL.

WMC:jd Enclosures. [32]

EXHIBIT "E"

National Labor Relations Board
Washington, D. C.

April 8, 1948

Reno Employers Council
Attention Mr. W. M. Caldwell
P. O. Box 290
Reno, Nevada

Gentlemen:

This will acknowledge your letter of March 26, 1948, in which you make inquiry with respect to the procedures required for the renewal of the agreement between the Reno Employers Council and the Building and Construction Trades Council of Reno.

The problem which you pose is a controversial one which doubtlessly will at some time be the subject of Board and Court decisions, and is one to which I do not feel justified in giving a solution without very thorough and careful study. I regret, therefore, that I find it necessary to decline to advise you on this matter. I am sure that you will understand the reason when you consider how many such requests have been directed to me in these busy times. I sincerely hope that these problems will soon become settled and that your legal advisers can now give you the assistance which you need.

Returned here is the copy of the agreement which you designated as Exhibit 1, in your March 26th letter.

Sincerely yours,

/s/ ROBERT N. DENHAM,
General Counsel.

Attachment. [33]

EXHIBIT "F"

Mr. D. W. Everett
440 North Virginia St.
Reno, Nevada
Dear Mr. Everett:

The negotiating committee, acting on behalf of all firms who have authorized the Reno Employers Council to represent them in their contractual relationships with the Building Trades Council and affiliate Unions, have instructed the writer to transmit the following reply to your communication dated May 18th and received May 18th and received May 19th.

In the negotiation held at the Labor Temple yesterday, May 18th, we informed you and the Building Trades Council's negotiating committee that it was the position of the employers involved in the Master Contract that certain formal N.L.R.B. action was necessary before the contract, in its present form, could be extended. We further advised you that we were already in negotiations with a majority of the individual unions involved, on wages and hours, and that, in our opinion, the only proper subject for negotiation between the Building Trades Council and the Reno Employers Council was regarding the Sections of the Master Agreement which required revision by reason of the L.M.R.A. of 1947.

We clearly stated that neither the employers involved nor we, their representatives, were willing to be parties to any agreement which contained working conditions, contrary to the requirements of Law.

Your communication restates the position taken by your body yesterday, which in effect is a contention that the contractors and Unions signatories to the Master Agreement do not come within the jurisdiction of the Labor-Management Relations Act of 1947. The proposals you had advanced for meeting the present problem have been considered by the negotiating committee and have been rejected. Your Proposal to continue negotiating wage rates is acceptable and as evidence of the fact, we are continuing to meet with the various unions involved with the purpose of arriving at a satisfactory solution on wage rates prior to May 21st. However, because of the time factor involved, the negotiating committee asks me to advise you that we are at the moment considering taking one of two affirmative actions to prevent the accruing of possible liabilities by any employers [34] involved. This procedure was outlined to you more fully at our meeting yesterday.

It is our sincere hope that this entire matter can be settled amicably, and inasmuch as several of the unions, parties to the Master Agreement have already taken the necessary steps to qualify for union security clauses in their contracts, it is hoped that the other unions involved will follow a similar course so that this particular issue can be resolved to the satisfaction of all parties concerned.

Respectfully submitted,

RENO EMPLOYERS COUNCIL,
/s/ BENNARD C. HARTUNG.

[Endorsed]: Filed May 21, 1948. [35]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon the reading and filing of the verfied complain of [36] Plaintiff in this action, and it appearing to the satisfaction of the Court therefrom that this is a proper case for granting a temporary restraining order, and that unless the temporary restraining order prayed for in said complaint be granted, immediate and irreparable loss and damage will result to applicant, before notice can be served and a hearing had thereon, in that the failure or cessation of negotiations between applicant and respondents, as provided for in that certain contract entered into between applicant and respondents on the 24th day of May, 1947, will prevent applicant, or its members, from entering into any other contract with respondents or any of them, or any other person, pending the final determination of this issue; and in addition will cause irreparable loss and damage to all of the citizens of the State of Nevada, due to the insecurity of the applicants and their inability to rely upon continued and constant employer and employee relationship between applicant and the various members of the respondent unions, and that such will interfere with the free flow of interstate commerce.

Now, Therefore, it is by the Court this 21st day of May, 1948, Ordered that the respondents and each of them, and their agents, servants, employees and attorneys and all persons in active concert or

participation with them, be, and they are hereby restrained, pending the further order of this Court, from permitting to continue in effect the letter of defendant, Reno Building Trades Council of Reno, Nevada, and vicinity, to applicant, dated the 18th day of May, 1948; and from issuing or otherwise giving publicity to any notice that, or to the effect that the contract aforesaid, has been, is or will at some future date be terminated, or that said agreement is or at some future date will be nugatory or void at any time during the pendency of this action; and from breaching [37] any of their obligations under the contract of the parties hereto dated the 24th day of May, 1947, and from coercing, instigating, inducing or encouraging by economic pressure or otherwise, the members of the various respondent unions in the state of Nevada, or any of them or any person to interfere by slow-down, walkout, cessation of work or otherwise with the operation of the businesses of the members of the applicant by continuing in effect the aforesaid letter or by issuing any notice or termination of agreement, or through any other means or devices; and from interfering with or obstructing the negotiations between applicant and defendants, pursuant to the contract aforesaid; and from taking any action which would interfere with this Court's jurisdiction, or which would impair, obstruct or render fruitless the termination of this case by the Court; and it is further ordered that this restraining order shall expire at 12:00 o'clock M. on the 31st day of May, 1948, unless before such time this order for

good cause shown is extended, or unless the respondents consent that it may be extended for a longer period; and it is further ordered that respondents appear before me and show cause why a preliminary injunction to the same effect should not be issued on the 28th day of May, 1948, at 10:00 o'clock A.M. thereof, at the Court House in Carson City, Nevada.

The bond on this restraining order is hereby fixed at $1,000.00 until the further order of the Court.

Dated: May 21, 1948 at 4 o'clock P. M.

/s/ ROGER T. FOLEY,
Judge of the District Court of the United States of America, in and for the District of Nevada.

[Endorsed]: Filed May 21, 1948. Refiled May 22, 1948.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now come the defendants above named, represented by their counsel, Morley Griswold and George L. Vargas, esqs., with [39] the exception of Defendant Local Union of Operating Engineers, No. 3, and appearing especially for the purpose of resisting the Order to Show Cause and Restraining Order hereinbefore issued from the above entitled Court in the above entitled cause, and moves the Court as follows:

I.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that the said complaint upon which said Order to Show Cause and Restraining Order is based does not state facts sufficient to sustain the said Show Cause and Restraining Order.

II.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that the same is issued upon the complaint based upon information and belief.

III.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that the above entitled Court lack and did lack jurisdiction to make and issue said Order to Show Cause and Restraining Order and to continue the same during the period set forth in the Order and until final adjudication of the above entitled case.

IV.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that it appears on the face of the complaint that the plaintiffs are not proper parties plaintiff in the said action and have no capacity to sue.

V.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground

that Defendant Building and Construction Trades Council of Reno is not a proper party to the complaint. [40]

VI.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that Defendant Operative Plasters and Cement Finishers Local Union Number 241 is not a proper party to the complaint.

VII.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that it is improper as to all of the named defendants.

VIII.

To vacate said Order to Show Cause and Restraining Order for the reasons and upon the ground that the Court lacked jurisdiction to grant the relief sought by reason of the Norris-La Guardia Anti-Injunction Act, Act of March 23, 1932, 193, C.90, 47 Stat. 70, 29 U.S.C.A., Secs. 101-115.

Wherefore, defendants, and each of them above named, pray that the said Order to Show Cause and Restraining Order be vacated.

MORLEY GRISWOLD,
GEORGE L. VARGAS,
Attorneys for Defendants.

[Endorsed]: Filed May 28, 1948. [41]

[Title of District Court and Cause.]

ORDER

A temporary restraining order having heretofore been granted without notice, the Motion for preliminary injunction was set down for hearing on this 28th day of May, 1948, in the courtroom of the above [42] entitled Court in Carson City, Nevada, and after hearing counsel

It Is Ordered, Adjudged and Decreed that the application for preliminary injunction be, and the same hereby is, denied and that the temporary restraining order heretofore made and entered is hereby dissolved and vacated upon the grounds and for the reasons stated by the Court in ruling upon said Motion.

Dated: This 28th day of May, 1948.

ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed June 2, 1948. [43]

[Title of District Court and Cause.]

ORAL OPINION OF THE COURT

Made and Entered May 28, 1948:

The Court: "I am ready at this time to rule on the question of the motion you made this morning, Mr. Brown.

At the beginning of the session this morning, Mr. Brown, on behalf of the petitioner, moved the Court for a preliminary injunction to preserve the status

quo and that is a matter that we have discussed and considered throughout the day. Now, on the 21st day of May the Court made its order to show cause and issued temporary restraining order. The order to show cause required that the respondents appear before the Court and show cause why preliminary injunction, to the same effect as the restraining order, should not be issued, on the 28th day of May, 1948, at 10:00 o'clock. At the time the application was made for the temporary restraining order, the Court's attention was called to the case of United Mine Workers of America, 330 U. S., 258 and in the course of its opinion the Supreme Court of the United States in that case stated:

> "In the case before us the district court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief."

In that case the defendants determined the law for themselves and did not heed the injunction of the district court [45] or the restraining order of the district court and violated it and they were held in contempt.

Now I feel that this is the same situation we have here. If this order that was made May 21st had been violated by any of the persons to whom it was directed, I wouldn't hestitate to act. I wouldn't hesitate to punish for contempt any person or persons or organization who violated that restraining order, under authority of the United States vs. United Mine Workers, on the theory that this court, and any other court, has a right to hold matters in

status quo until the Court has opportunity to decide the questions involved, questions of law, and that was the purpose I had in issuing the preliminary order, temporary restraining order, in this case.

Now we have had an opportunity to hear from counsel on questions of law concerning the issuance of temporary restraining order or preliminary injunction. I can't understand how it could be said that there is no labor dispute involved here. I think counsel has stated that the purpose of this is to prevent labor dispute from arising, or series of labor disputes from arising, so then we are, of course, interested, involved here, in consideration of labor disputes, not existing now, but contemplated in the future. Before the so-called Taft-Hartley law was enacted, and which is merely an amendment of the National Labor Relations law, the National Labor Relations law was in general the same kind and class of legislation as the Taft-Hartley law, and when complaints were made before the National Labor Relations Board, the employers complained of frequently questioned the jurisdiction of the National Labor Relations Board. Many cases are shown in the annotation to the different sections, having to do with the law before the enactment of the Taft-Hartley law, that the defendants or respondents, as they might have been called, raised the question of the jurisdiction of the National Labor Relations Board, claiming that they were not involved in interstate commerce or their activities did not affect interstate commerce. One of those cases is the National Labor Relations [46] Board vs.

Van de Camp Packers in the Ninth Circuit, 152 Federal Reporter, Second Series. This is in the circuit court of the Ninth Circuit. The Board petitions for the enforcement of its order. The company contends first that the National Labor Relations act is not applicable, since it is not engaged in interstate commerce. It was decided there that that particular case was without merit.

Now suppose some controversy does arise here. What is there to prevent the petitioner from filing a complaint with the National Labor Relations Board, complaining about some alleged unfair labor practice of one of these unions, or of a group of these unions? Then the union or unions involved could raise before the National Labor Relations Board the question of whether or not it was involved in interstate commerce, or whether its activities affected interstate commerce. Then the National Labor Relations Board could determine whether or not it had jurisdiction of the case and the party dissatisfied could take the matter to the Circuit Court of Appeals.

Cases of jurisdiction of the National Labor Relatoins Board have, I think, in the past always been cases first to the Board and then afterwards carried into the Courts. I feel that whatever restrictions placed upon the courts by the Norris-LaGuardia bill still exist, unless we can find that they have been lifted by the present act, the Taft-Hartley Act, so we have to look to that Act to see what the power of this court is in regard to the issuance of restraining orders and the exercise of the injunctive power of the court.

This action is brought under the declaratory judgment statute. Now if the Court couldn't, under the same set of facts as appeared in this complaint, issue an injunction in an action for damages, or an action for any other kind of relief, it couldn't issue an injunction in a declaratory judgment action. Petitioner may or may not be entitled to maintain an action to determine whether or [47] not any or all of these labor organizations are subject to the Taft-Hartley act. Whether such an action can be maintained is not now before the Court. The only question before the Court is whether or not this preliminary restraining order should be continued or whether a temporary restraining order or preliminary injunction should be issued pendente lite, and that is the only point I am attempting to decide.

Here is the holding of this court: That this court is without power to continue the present restraining order in effect and it is without power to issue, as prayed for, restraining order or preliminary injunction pendente lite, without prejudice at all to any other proceeding in this case, and that is the order of the court." [48]

[Title of District Court and Cause.]

HEARING ON ORDER TO SHOW CAUSE

Be it remembered, That the above-entitled matter came on regularly for hearing before the Court at Carson City, Nevada, on Friday, the 28th day of May, 1948.

Appearances: Brown & Wells, by Ernest S. Brown, Esq., Robert W. Wells, Esq., Theodore Hough, Esq., Attorneys for Petitioner. Griswold & Vargas, by Morley Griswold, Esq., P. H. McCarthy, Jr., Esq., Attorneys for Respondents. Louis A. Penfield, Esq., representing National Labor Relations Board.

The Court: Gentlemen, in the case of California Associations of Employers vs. the different labor organizations, are you ready to proceed at this time? I am very glad to grant the privilege of attorneys here in this particular litigation and as far as being an observer, Mr. Penfield, I welcome your participation in these proceedings.

Mr. Penfield: I wish to make my presence clear, your Honor, in that connection. As you know, the Board has not at this time filed any motion to intervene or stated to what extent [52] it desired to participate. I believe your Honor did talk with some of our representatives in Washington and they did indicate to your Honor there were two basic questions in which they did have considerable interest. There are many other issues here and at this time I do not wish to ask for a continuance or in any way interfere with these other matters being considered, but I believe your Honor is familiar with the basic issues in which we are interested.

The Court: I will be glad to hear any expression you desire to make during the course of these proceedings.

Mr. Penfield: If I can be of any assistance, I shall be glad to do so.

Mr. Griswold: On behalf of the defendants, at least, if Mr. Penfield has any suggestions to make, or the Court, I would appreciate the same and as a friend of the court he would be more than welcome and I assure your Honor no objection or exception will be taken, insofar as the defendants I represent are concerned, so Mr. Penfield is more than welcome.

The Court: Mr. Griswold, do you represent all the defendants named?

Mr. Griswold: No, I do not. There is one defendant particularly that I do not represent. That is the Local No. 3 of the Engineers. That Local is represented by Mr. McCarthy. The rest of the named defendants I am authorized [53] to speak for.

The Court: Now, Mr. Brown, I understand perhaps the burden is on you.

Mr. Griswold: Your Honor asked a question. I know your Honor likes to handle these matters as expeditiously and informally as the rules will permit. My thought in the matter is this—I believe that the show cause order puts the burden on us to show the cause. However, I do believe that the restraining order, having issued without affidavits being attached, that counsel for the petitioner should introduce the complain in evidence, together with the exhibits that are attached hereto, thereby having before the court, in the form of evidence, the complaint and the exhibits. Now on behalf of the defendants I represent, I will consent that the exhibits, although there has been no oppor-

tunity of cross-examination, may be introduced in evidence and that the signatures thereto be true signatures and the parties making the various exhibits have authority to so make the exhibits, not binding ourselves or counsel on the other side to the truth or the untruth of the exhibits, with the right of putting in testimony, if it becomes necessary, in connection with those exhibits.

Now I suggest further, for the purpose of expediting this case, that there are probably two other documents that should be made exhibits in this complaint. One is a letter that was written on the 21st day of May and delivered before [54] the filing of the complaint. That was written by my clients. And the other is a reply that came to that letter, that was delivered to us after the 21st day of May and may be without the issues, but I believe for the purpose of expedition that it should be also put in —one is a letter from my clients, the other is a letter from Mr. Brown's clients in this matter, and I suggest and offer to have those admitted as exhibits, under the same statement that I made with references to the other exhibits that are attached to the complaint, and then we can proceed on an argument of law, if we so desire.

Mr. Brown: May it please the Court, we appreciate the recommendation of counsel, but it occurs to us at this time, upon what theory is counsel in this matter? I mean, as far as the pleadings are concerned. Mr. Griswold said he represents the respondents. We find no motion to dismiss, we find no motion to dissolve, we find no answer, and we

believe that under Rule 65, upon the burden of proof being assumed by the petitioner, we should go ahead on our prayer and our showing in our verified complaint, wherein we ask for a preliminary injunction, and in pursuance to the allegations of our verified complaint and the prayer therein, we now formally move this Court for a preliminary injunction pendente lite to preserve the status quo under the terms of Exhibit A attached to our verified complaint, until this case is at issue and until such time as your Honor has had an opportunity to determine your [55] jurisdiction and the other matters that may be presented on the merits of our prayer for declaratory judgment, and we are prepared to go forward with our burden on that proposition.

Mr. McCarthy: I believe, as I understand it, counsel for petitioner has moved your Honor to grant an injunction pendente lite and I assume—of course, we are interested in having this record correct—I assume that that motion is based upon the complaint. Am I correct?

Mr. Brown: Yes.

Mr. McCarthy: And I assume in basing it on the complaint that the complaint is before the Court, as in any case which you have, in support of that motion, as of this moment.

Mr. Brown: May it please the Court, that is not all of it.

Mr. McCarthy: I said as of this moment.

Mr Brown: May it please the Court, first I may suggest there is also in the record of this case the

ex parte record of the testimony which myself, as witness and counsel for the petitioner, did have transcribed and presented to your Honor on application for ex parte restraining order.

Mr. McCarthy: If the Court please, we will, on behalf of Local No. 3 of the Operating Engineers, object to your Honor considering in this proceeding any oral testimony taken out of the presence of the parties, out of the presence of counsel, where there was no opportunity to cross-examine, and [56] if counsel's remarks constitute an offer of evidence at this stage, we will object to the introduction of the same, upon the ground we have had no opportunity to cross-examine the person therein testifying and as such it is incompetent, irrelevant, and immaterial in this proceeding.

Mr. Griswold: May I join with counsel and add to that up to the present time there has been no service of any of that testimony upon any party that I know of.

The Court: That testimony of Mr. Brown was taken upon his application for the restraining order, which was granted, and that all that it was offered for and that is all it has been, and will be, considered by the Court for, unless it is again offered in these proceedings and if it is, you will have opportunity to cross-examine Mr. Brown.

Mr. McCarthy: Now, if the Court please, counsel having stated the position of the petitioner, our appearance here at this time on behalf of Local 3 is a special appearance, for the purpose of respectfully challenging the jurisdiction of this court to

issue the order to show cause in the first instance on the restraining order. I do not think it is necessary at this moment to burden your Honor with argument, which will come in due course. Sufficient to say we take the position that your Honor, by virtue of the statutes of the United [57] States, does not have the authority to issue the order in the first instance, that the restraining order was unauthorized; that, in addition, the complaint does not state facts sufficient to constitute a cause of action or to support the issuance of the restraining order; that, as a matter of fact, from the face of the complaint, it appears that this plaintiff can not state a cause of action against Local 3 or any of these defendants, no matter how it might amend that complaint. As I say, there is no intent at this moment to burden your Honor with argument, but I would like the record to be clear that the first issue we present is the jurisdiction of this court, not as of today, but as of the moment that the order was signed. Thank you.

Mr. Griswold: I call to your Honor's attention, and not in the way of argument——

The Court (Interrupting): Could I ask a question of Mr. McCarthy before you proceed. You say, "as not of today." You also contend that the Court would have no authority to grant the motion made by Mr. Brown?

Mr. McCarthy: That is right. Our position is that your Honor did not have jurisdiction at the beginning and, of course, therefore, could not have jurisdiction at any proceedings.

The Court: No jurisdiction to continue or authorize [58] temporary injunction pendente lite?

Mr. McCarthy: We ask to vacate the order. Of course, everything else, then, would naturally fall by the wayside.

Mr. Griswold: Upon other matters similar to that raised by Mr. McCarthy, I call to your Honor's attention that the complaint as it stands, the parties who are parties plaintiff and the parties who are parties defendant, are shown upon the complaint to not be the real parties in interst and to not have the right to bring this suit and the defendants are not bound by anything that is in the complaint and it shows on the face of the complaint. Incidentally, we understood we would be here at 10:30 and my brief case and motions will be presented in due course. I made the suggestion to counsel only for the purpose of expedition. Evidently I made the wrong motion, because it does not look to me like we expedited at all. If he does not want to do that, then we will proceed.

The Court: If counsel can agree upon the order of procedure, the Court will gladly conform to the agreement, if it can be made, and if it can not be made, we will then try the opposite method of procedure.

Mr. Brown: May I offer a suggestion to the Court and counsel to assist? Apparently from what Mr. Griswold just suggested, there are some written motions or something which they intend to file, which may present something to your Honor that [59] your Honor may feel should be heard prior

to the hearings of the motion which I have orally made this morning, and may I respectfully suggest that we take a 10 or 15 minute recess in order that counsel on the other side may serve us with such either written motions or what have you, and in order that counsel may clear relative to what we may stipulate, which may save the Court's time on the matter of defense.

Mr. McCarthy: May I suggest to your Honor where Local 3 is concerned, in view of the shortness of time and in view of the fact that our headquarters are in San Francisco, we are in no position to file written motions at this time. However, we are prepared to stand on our oral motion in respect to jurisdiction and may we respectfully suggest to this Court, since jurisdiction is fundamental, and particularly so in a district court of the United States, it is hardly proper we should consider anything else until we dispose of the question of your Honor's jurisdiction.

Mr. Griswold: I join in that. We are in position if necessary, which we do not admit, to file motions to dismiss and strike upon the grounds upon which we will proceed, but my suggestion—it wasn't a motion—my suggestion was in order to get grips on this, so we would know what we were doing. This restraining order and preliminary injunction is asked on what? As far as we know, upon the complaint. Now let's get it before the Court. [60]

The Court: It is evident to the Court counsel can not agree upon the way we will proceed, so I am going to indicate how we will proceed. The bur-

den is going to be upon Mr. Brown's clients to show this Court that the Court had jurisdiction to issue the order that has been issued and to issue a preliminary injunction pendente lite, and also to show this Court the Court has jurisdiction of this action. So the burden is placed upon Mr. Brown and I think that can be done without any written motions or pleadings, just on questions of law that will be presented. That is my suggestion.

Mr. Brown: We are ready to go, your Honor.

The Court: So we wouldn't need that 10-minute recess?

Mr. Griswold: Right.

Mr. Brown: May it please the Court, of course, at this time our first bit of evidence that we desire to present is our verified complaint, which is on file herein, but in order to expedite and to suggest to the Court in reference to our theory in this particular matter, and with the reservation of the right to go forward with our burden on the facts, we desire to outline our legal theory of the case very briefly.

This matter is a very simple matter. We have filed a [61] complaint, in which we have alleged that there exists an actual controversy. We have, therefore, predicated our jurisdiction upon two propositions. The first proposition—I will present the Court with a memorandum that may be of assistance—our first proposition, may it please the Court, is this: We want to make the distinction between Title 28, Section 400, which provides for a remedy, to-wit, a declaratory judgment in the federal court, and the question of jurisdiction itself. The juris-

diction of this suit is based upon Title 28, Section 41(8), upon the theory that any suits and propositions arising under any law regulating commerce is within the jurisdiction of this Court. In the memorandum, on page 4, the Supreme Court of the United States, in the case of American Federation of Labor vs. Watson, 90 L. E. 873, that was a case where a number of——

The Court: You do not know the citation of the United States Supreme Court?

Mr. Brown: No, I will have Mr. Wells check that for you. But here was the situation in that case. Florida had passed a railroad closed shop amendment to their State constitution. A number of local labor unions and people engaged in interstate commerce petitioned the federal district court for restraining order against Watson, attorney general for the State of Florida, who had brought certain proceedings and seeking a permanent injunction under a bill in equity. Among other questions that [62] came up was the question of whether or not the federal district court had jurisdiction of that case. The Supreme Court of the United States said it involved an alleged conflict between the National Labor Relations Act and the Constitution or laws of Florida. The Supreme Court in that Watson case said, and I am quoting from our memorandum, in answering the proposition of jurisdiction: (Reads from memorandum.)

Now since the federal court has jurisdiction of suits and propositions arising under any law, meaning any law of Congress, relating to commerce, we now invite the Court's attention to page 2 and 3 of

our memorandum, wherein the Labor Management Relations Act of 1947, which colloquially may be called the Taft-Hartley Act—is an act—this is at the bottom of page 2) Sec. 1(b) (Reads). Then we turn over to Sec. 101, found on page 3: (Reads.)

In other words, Title 28, Section 41(8) says that that type of controversy involving interstate commerce is within the jurisdiction of the federal court. We contend that the Labor Management Relations Act, which we have alleged is applicable to the parties and and transactions to the contract marked Exhibit "A" to our complaint, is squarely a matter within the federal court's jurisdiction.

Now may I make this position clear to the Court and for the information of counsel. The Court, having jurisdiction, we then are seeking a remedy, and we have sought that [63] remedy under the federal declaratory judgment act, which is Title 28, Section 400. Now under that particular section we are contending that we have pleaded an actual justifable controversy, which is now ripe for decision, and what is that controversy? That controversy is simply a proposition of whether, in negotiating and bargaining between the petitioner, its members and respondents, this book of rules applies, to wit, the Labor Management Act of 1947, or whether this book of rules, which is your State regulations of labor, applies. We have predicated our position in our complaint upon the proposition that people and the industry are involved in interstate commerce, that the Taft-Hartley Act applies, that we can't negotiate or bargain any further without subjecting

ourselves to penalties under that act and under the decisions of the Supreme Court of the United States an actual controversy is presented. Now what is that controversy? It does not involve any restraint upon the National Labor Relations Board, nor does it involve any interpretation of the Taft-Hartley bill, nor does it present a labor dispute, your Honor. It is just simply a question of whether or not these people are within the provisions of the Taft-Hartley Act or whether they are not.

Now in view of that situation——

The Court (Interrupting): May I ask you a question right here—do you mind?

Mr. Brown: Not at all. [64]

The Court: Just assume that we are under the provisions of the Taft-Hartley Act, for argument here, consideration—wouldn't the proper procedure be on the part of the respondents or petitioners to file a complaint with the National Labor Relations Board?

Br. Brown: It would not, your Honor, and I will tell you why it wouldn't. It is alleged, in the first place, in the complaint, as an exhibit, that petitioners have asked the general counsel of the National Labor Relations Board for an opinion. He said it is a controversial matter and no opinion would be given. Now in the second place, the only time you can petition the National Labor Relations Board is when you are authorized to do so under that act, and the petitioners here are not permitted to petition on questions involved in this particular dispute. In other words, before the petitioner can

bargain under the Taft-Hartley Act, in reference to a union security clause, there must have been a petition by the unions for the purpose of changing an allegation on the part of their members upon the question of whether or not their representatives and bargaining agents would be authorized to have a union security provision in the contract. There is no unfair labor practice. The Board has no jurisdiction in this matter. This matter, may it please the Court, is just as simple as though we were asking your Honor if we were an interstate carrier or if [65] there were a question as to a direct line company, whether we were under, say intra-state, and we came in under petition asking for a declaratory judgment, whether this petitioner, by reason of being engaged in certain factual operations, were governed by the interstate commerce act or whether it was entirely within the jurisdiction of the Nevada State statute, public service commission, and once having decided that, any further proceedings or any further practices in respect to the operations of the petitioner respondents in their labor relations, management relations, would then be a matter that would have to be proceeded orderly and in accordance with the Taft-Hartley Act and perhaps before the Board. This is merely a well-recognized procedure under a declaratory judgment. The most enlightening article on this very thing is found in the last issue of the American Bar Journal.

Mr. Haugh: If the Court please, while Mr. Brown is finding this, I would like to suggest this, that in reference to your question, if that appear

to be true, that we are then entitled to the judgment we have asked for now, because we must presuppose that the Taft-Hartley Act applies to our operation before we give any consideration to what rights the parties may have under it.

The Court: Your suggestion raises another thought in my mind now. I do not like to interrupt the trend of counsel's argument by questions and if [66] it annoys counsel, I won't do it.

Mr. Brown: It does not. We are interested in getting at the facts and the law.

The Court: But the National Labor Management Act of 1947 is an amendment of the existing National Labor Relations Act. Now what was the situation in regard to the Norris-LaGuardia Act prior to the enactment of the so-called Taft-Hartley law?

Mr. Brown: May I answer that right here, Judge. Our position, may it please the Court, is this: before anybody can get up on his hind legs and assert any limitations upon jurisdiction of this court by reason of any of the federal anti-injunction acts, they have to demonstrate by proof to your Honor two propositions; first, that the plaintiffs and respondents are doing business in interstate commerce or they are not applicable. They were, true, under the old National Labor Relations Act, because the old act did not apply to every industry or every employer——

The Court (Interrupting): I want to tell you what my idea is right now, so that you can follow your argument along that line. I have an idea my-

self on this proposition and that is that the National Labor Relations Act and the so-called Taft-Hartley Act did not repeal the Norris-LaGuardia Act. [67]

Mr. Brown: We agree.

The Court: Then if this Court has any power to issue an injunction in labor matters, that power must be conferred by the Taft-Hartley Act or it does not exist. That is my view.

Mr. McCarthy: May it please the Court, the Supreme Court last week finds on this exact problem and counsel has the record.

The Court: I do not want to interrupt counsel, but that is the way I feel right now. If this Court thought the Norris-LaGuardia Act is still law, then the Court, if it has power to issue a restraining order against labor, must find it in the Taft-Hartley Act or it does not exist. Now that is my feeling.

Mr. Brown: May it please the Court, your proposition is answered in the United States Supreme Court, United States vs. United Mine Workers. It is found—now, may it please the Court, apparently you like to have the United States citations——

The Court: Just a moment. Let me follow that with another subject. That gives us another question, of whether the United States government was an employer, that is where the government was involved. [68]

Mr. Brown: That wasn't all of it. May I suggest this, I have read this case a dozen times and I may not be able to analyze it as ably as the Court or other counsel, but here was the simple proposition. Lewis was president of the United Mine Workers

Union. They had a contract at one time with the owners of the mine, had a collective bargaining contract, then the government took over the operation of the mines. Mr. Krug, Secretary of the Interior, in that particular case was then called in in negotiation relative to the continuance of terms of the contract and its termination by Mr. Lewis and after they had debated the matter and negotiations for a while, Mr. Lewis wrote a letter to the Secretary of the Interior, in which he said, "This contract is terminated on the 20th of November." Immediately the United States then petitioned the federal district court and asked for the very same thing that we are asking for. They asked for a simple declaratory judgment that whether or not Mr. Lewis had the legal right, under the circumstances pleaded in their petition, to terminate the contract. They also prayed for a temporary restraining order. Now Chief Justice Vinson, in writing that majority opinion, did say, it is true, that there was a distinction because the United States was a petitioner, there was a discussion and a decision about the fact that the government was not included within the Norris-LaGuardia Act, but Chief Justice Vinson, on page 910 of 91 Law Edition and in the majority of the opinion [69] presents the very proposition that we are contending for. If we fail on this proposition, we are through and it is our position that until this Court has an opportunity to determine its jurisdiction and whether or not this business is a labor dispute, and that presumes a decision upon the merits on this particular question, it has the

inherent right, by virtue of being a court, to enjoin and maintain the status quo. (Reads: "Although we have held that the Norris-LaGuardia Act did not * * *").

Now the Union in that case, and Mr. Lewis, contended may it please the Court, that there could be no punishment for violation because under the Norris-LaGuardia Act and Clayton Act the federal court was without jurisdiction to issue temporary restraining order for which these people were subject to being punished for violating. Now then Justice Vinson says this: (Reads: "Attention must be directed to the situation * * *").

Justice Frankfurter did disagree with the majority of the court upon the proposition that said this is not a labor dispute under the Norris-LaGuardia Act because the government is a petitioner and for some other reasons. Justice Frankfurter said, "Well, I do not agree with the majority. I think this is a labor dispute. It all arose out of the so-called Krug-Lewis agreement, and I feel the court has not authority on the merits to give injunctive relief without complying with the Norris-LaGuardia Act, but Mr. Justice Frankfurter agreed in the opinion of the court, the majority upon this proposition: (Reads: "And so I join the opinion of the court * * *"). Meaning this Lewis case, where the government had asked for a declaratory judgment. Mr. Justice Frankfurter says: (Reads: "In the case before us the district court * * *").

Now counsel would have us believe, and the Court has intimated, that although this temporary re-

straining order was issued without any jurisdiction, that this Court has no injunctive power——

The Court: The Court has not intimated that.

Mr. Brown: I don't mean it that way.

The Court: And I will say I agree with the views of this present case, United States vs. United Mine Workers and the Court has acted under that case in issuing this preliminary restraining order, and I would like to go further, if there had been any violation of the restraining order issued, I would not have hesitated to punish the person who violated it for contempt, but now we have got to the point where we are going to determine whether or not this Court has jurisdiction to continue the present order in effect or to issue a preliminary injunction and we exercised what we thought were our powers under the United Mine Workers case, issued the preliminary restraining order to hold matters in status quo until today. [71]

Mr. Brown: May I make our position clear in that respect. May it please the Court, we take this position, that your Honor is in the same position at this moment, right now, as you were on the 21st of May, 1948. There is nothing before your Honor other than a complaint. Now if counsel for the respondents assume that this Court has no jurisdiction whatever to entertain our motion for a preliminary injunction to maintain the status quo, then counsel has got to concede that the parties to Exhibit "A", the master contract, and our people are engaged in interstate commerce and if they are the Taft-Hartley Act applies and if the Taft-Hartley

Act applies, that is all in the world we are seeking. If this Court were in a position right now to say from the record of this case and the pleadings of our people are engaged in interstate commerce, therefore the Taft-Hartley or the federal statute applies, that terminates this controversy. There is no need for a continuation of the temporary order, there is no need for a preliminary injunction, but until the Court does determine that—that is all we want, a simple order that we are engaged in interstate commerce and we are governed by the Taft-Hartley law, and then we will go ahead, it is res adjudicata, but until the Court makes that determination, it seems to us, may it please the Court, that two things must be determined by this Court —first, if we are engaged in interstate commerce must be determined first, because if we are not, then your Norris-LaGuardia [72] and Clayton and injunctive statutes do not apply. In other words, even if we are, there are exceptions to the Norris-LaGuardia Act and the Clayton Act. In those cases which do not involve a labor dispute, the court is not precluded.

The Court: I am going to tell you how I am presently inclined. Unless you can show this Court that this Court has jurisdiction, power and authority to issue an injunction or restraining order, in the face of the Norris-LaGuardia Act and as it stands now, affected or not affected by the Taft-Hartley law, I am going to set aside the restraining order. That is the problem I want to have shown to me. That is the way I feel now. Let counsel finish

his argument. That Norris-LaGuardia Act restricts the power of the federal court to issue injunction in labor disputes and as far as the remaining features of this case is concerned, the question of determining whether or not the defendants or respondents are subject to the terms of the Taft-Hartley Act, is another question.

Mr. Brown: Your Honor, the Norris-LaGuardia Act is Title 29 and Section 113 of that act is the section which defines the legislation under the Norris-LaGuardia Act to issue injunctive relief. [73]

Mr. Griswold: May I ask counsel a question in that respect. Have you considered Section 107, which has to do with labor acts? Section 113 is not the section, I do not believe. Section 107 is the section that has to do with issuance of injunctions, not labor act.

Mr. Brown: Section 105 of Title 29 provides as follows: (Reads) Now turning over to Section 113, we have certain definitions in the act. Dropping down to (c) of 113: (Reads) Now this Court is not deprived of its injunctive relief for that petition under declaratory judgment, for the reason there is no labor dispute involved in our complaint, as contemplated in Section 113(c). In the first place, it has not been proven, the record does not disclose it—all we are asking for is this: Is the operation of this industry interstate, and by virtue thereof does the federal statute apply? We are not asking for any adjudication of anything else. It is true, may it please the Court, in paragraph, I believe VII, we have talked something about wages and hours and

things of that kind, but the only purpose of those sections were merly directed to the proposition of showing irreparable injury. The only thing we are asking for in this case is whether or not the federal statute governs. If it does, we are not asking for the Court to do anything under the federal statute. We are not asking for an interpretation of it. There is no labor dispute. There [74] can be no labor dispute. If there is a labor dispute and this Court enters a declaratory judgment covered by the Taft-Hartley Act, then the respective parties to the case, respondents and petitioners, must then pursue their remedy before the National Labor Relations Board.

The Court: Suppose the Court did decide immediately, right now, that these defendants were subject to the Taft-Hartley Act——

Mr. Brown: Your Honor, this is the only issue.

The Court: Then there would be no restraining order?

Mr. Brown: Nothing more there. That is all we are asking for.

The Court: So if the Court dissolves the temporary restraining order pending hearing on the other issue, you will be in no worse position than you would be if the Court immediately decided that defendants were subject to the Taft-Hartley law?

Mr. Brown: Your Honor, we feel that upon the proof which we intend to offer your Honor, assuming your Honor feels you have jurisdiction to entertain our motion for a preliminary injunction, not only the allegation of our complanit, but we maintain, may it please the Court, that unless the status

quo is maintained until the Court issues an order one way or the other, that there will be a complete termination of Exhibit [75] "A" and all of the rights of the petitioner, and also the rights of the respondents, will terminate under that thing. Now if the Court were in a position today to say the Court enters the order and finding from the record petitioners, members of the contractors, engage in interstate commerce, the Labor Management Relations Act of 1947 applies, then, right then and there, the status of these people, without subjecting themselves to any penalties under their contract or under the Taft-Hartley law, would then be permitted, under a judgment which becomes res adjudicata in regard to states to handle their own labor management affairs under the Taft-Hartley Act. There is no labor dispute here.

Our thought, your Honor, is that the purpose of a declaratory judgment is to have the determination without incurring of penalties of any kind, and if we could get to the merits, we would be willing to try the merits right now, if counsel is ready to go to bat on it, and in view of the fact the restraining order at this time extends to the 31st, if we could conclude our trial today and tomorrow morning on the simple question of whether the act is applicable or not and the court enter its declaratory judgment, it would perhaps obviate the necessity of going into a collateral injunctive hearing and it would also terminate the controversy.

Mr. McCarthy: May it please the Court, might I ask counsel through the Court, if the Court will

permit me a [76] question, and that is this: Counsel stated there is no labor dispute and I think he means it seriously. What troubles me here, why are my clients refrained from striking or slowing down or walking off the job if there is no labor dispute, and I don't see why, I can't understand why, we should be refrained from doing those things, if there is no dispute.

Mr. Brown: There is no labor dispute within the purview of the statute. The only dispute is, may it please the Court, whether or not these people are so engaged in interstate commerce, or their activities, under an existing contract, so under interstate commerce as to be governed by the Taft-Hartley Act as the rules by which they apply the agreement. There is no dispute over wages, there is no dispute over working conditions, there is no dispute over anything other than whether or not their negotiations and collective bargaining, or whatever they do in their relationship, should be governed by this book of rules or that.

The Court: Let me ask you another question. Under sections 158-529 of the Taft-Hartley law, there was set forth what constitute unfair labor practices and the first division relates to unfair labor practices on the part of the employers, then there is a subdivision (b), which is new—didn't exist in the prior act—recites there shall be a fair practice for labor to do several [77] things; then way down in subdivision (d) on page 17 of the pamphlet of the annotations: (Reads: "For the purpose of this section to bargain * * *"). I thought

that that might, in this provision of the law, when considered with the subject matter of the complaint, might bring this complaint squarely under the theory of labor dispute or under unfair labor practices.

Mr. Brown: No, your Honor, for this reason. The formal way that injunctive relief is obtained is through bill of equity, asking for injunction. This is merely ancillary and the main issue is whether or not this book of rules applies. Now if this book of rules, the Taft-Hartley Act, does not apply, then neither does the Norris-LaGuardia or Clayton Act and the only proposition is first, whether or not we are engaged in interstate commerce. Now if the Taft-Hartley Act applies and then if either party be guilty of an unfair labor practice, then their remedy is to go to the National Labor Relations Board under the labor act, but we are not alleging any unfair practice, we are not alleging anywhere a labor dispute, we are not asking for judgment for damages against these people. The only thing we are asking for is declaratory judgment before our rights are jeopardized, and that was pointed out, may it please the Court, in this power of the Court, under the declaratory judgment act, in a case written by Justice [78] Holmes, Etna Iife Insurance Company vs. Haworth, and that is found on page 381 of American Bar Journal, the discussion I am going to read now.

Mr. McCarthy: May we have the United States citation on that?

Mr. Brown: I will find it in a second. I am reading now on page 381 from an article which is a

reprint of an address given by Duval in 1947 before the Judicial Conference of the Tenth Circuit. (Reads.) Then they go on; Haworth contended he had certain rights under the life insurance policy. The company said he didn't. The only way they could determine it was when he died, unless they petitioned it under Title 28, Section 400, the declaratory judgment statute. Then he points out the uses of the declaratory judgment and on page 434: (Reads.) Then dropping over: Reads: "Before following——" and he cites there Kern vs. Wall, 306 U. S.

The Court: The point that seems knotty and difficult to me is this: I have an idea—maybe I am wrong—that the Norris-LaGuardia Act encroached upon the equity powers of the court to issue injunctions, just reached in there and took that power out in regard to labor matters. That is the idea I have and I can go along with you on the theory that we can entertain this case under the declaratory judgment law, but as far as accompanying [79] it in any way by means of restraining order, I do not see how that can be done. That is the point that worries me.

Mr. Brown: In this Lewis case in discussion of the majority opinion, it seems clear that the Norris-LaGuardia Act—of course, it does not apply at all unless we have interstate commerce, and if we do, we are entitled to our declaratory judgment, so there is nothing before the court—but in the majority opinion in that Lewis case, I think it was pointed out that, without any fear of contradiction,

the Norris-LaGuardia Act does not prevent the district court from having the power to issue a preliminary injunction, except in certain circumstances. Now one of those circumstances is this, where there is a labor dispute involved. The federal courts held this, may it please the Court, under the old National Labor Relations Act, before the Taft-Hartley Act, they have held that where a union had been certified by the National Labor Relations Board as the bargaining agent with the employer, and that particular bargaining agent and employer had no labor dispute, but, however, a rival union came in and sought to negotiate and bargain and harrass and sought to assume jurisdiction, and where injunctions were asked and where the national unions said to the district judge, "Now, listen, this is a labor dispute and the court has no authority under the Clayton and Norris-LaGuardia Act to issue a preliminary restraining order," the Circuit [80] Court of Appeals—and I will get the citation—in many districts and on numerous occasions have said that there was no labor dispute in those types of matter. There have been a number of cases, two or three of them by the Supreme Court of the United States, where there was some sort of secondary boycott and picketing and there was no labor dispute between the immediate employer and his immediate employees, the Supreme Court has said—I think the Swing case is one—there was no labor dispute, even though it arose under the unions, but the most recent case I find is the Columbia River Packers by the Supereme

Court of the United States—I have to get that citation, I think it is in 85 or 86 Law Edition. It is Columbia River Packers case, cited by the Supreme Court of the United States. Now there was a case where the canners and processors operating in Washington, Oregon and Alaska did business with the union. They made their bargainings through a union, but also the members of the union, the fishers, were the only people who actually caught the fish and sold the fish to the canneries. Then they went in to the court and sought, under a bill of equity, injunctive relief. The proposition was squarely put up to the court, the court has no jurisdiction under the Norris-LaGuardia Act nor under the Clayton Act, because this involves a labor dispute. They went to the Supreme Court of the United States and it said while the fishermen themselves were organized into a union, that while [81] they, themselves, were independent contractors, yet what they were going to do was strike unless they got a higher price for their fish. The Supreme Court of the United States said that was not a labor dispute within the definition of Section 113(c) of Title 29, hence the Norris-LaGuardia Act did not apply. I will get that citation. I read the case yesterday.

The Court: Was that for the reason that they were independent contractors?

Mr. Brown: Yes, your Honor, it was based entirely upon the proposition that they were independent contractors, even though it shows all the other facts of the case which would indicate a formal labor dispute. Our point in relation to this case

is this—we have no labor dispute even if the court found other federal cases were applicable, because all we are asking for is this, the Court to ascertain, under declaratory judgment, are we governed by this book of rules or that, so that we can operate under an authority decision of a court of competent jurisdiction after determination under the jurisdictional process that we are under the Taft-Hartley Act, so that our penalties and rights are not a matter of question. We say there is no labor dispute, but until there be a labor dispute it must be proven, as a defense to the jurisdiction in this particular case, because I respectfully suggest, under the Lewis case right now there is nothing in the pleadings or motions or anything else [82] before this court that demonstrates a labor dispute.

Mr. Griswold: May it please the Court, just briefly; well, I don't know, if there is no labor dispute, there certainly is no other kind of dispute in there. If that is true, I think we have been unjustly restrained from doing something or other, whatever it might be. I can't make out what this is if it isn't a labor dispute. It certainly has taken in practically all the unions in northern Nevada and other labor unions and they have been restrained. Now if they haven't been disputing with anybody, if they haven't been doing anything in the way of labor dispute, why in the world are they restrained? This court certainly does not go out and restrain people unless there is some kind of dispute. When you have an employer-employee situation and they have difficulties, why they are disputing and they

are disputing over the employer-employee relationship and it is a labor dispute. Now in the complaint they say they refuse to bargain. If that isn't a labor dispute—clearly, this comes within a labor dispute.

Now, let us see. Get off the law for a moment. Just look at this complaint. In the first place, it is by the California Association of Employers, a California corporation, doing business as the Reno Employers Council. Now let us look at what they claim to be the master agreement, and this, incidentally, is upon the jurisdiction question, because if you do not have, under that master agreement, the signatures of [83] parties to be bound—and there are parties who are enjoined here who are not parties to the master agreement but have other and separate and different agreements—certainly this Court is without jurisdiction to go out and pick any of those fellows out of the air and bring them in and enjoin them and restrain them. Let us just look at that master agreement and this complaint, because I think this is very important. Now it was supposed to have been signed by whom? The contractors, by Roy B. Flippin, representing general and/or independent contractors. Now that is the signature to the master agreement. It is not the signature of the California Association of Employers, a corporation. Let us say that Mr. Brown and I get together and we both have a client and we agree among ourselves that we want to sell our client's mine to Mr. Smith, so we act as bargaining agent between the two parties, but they have to sign the contract, haven't they, to sell it? This major contract was not signed by the California Employers

and that is the basis of their lawsuit. Let us go to just the next step, and that is this. We have enjoined here the Building and Construction Trades Council of Reno. Now the Building and Construction Trades Council of Reno is merely a bargaining agency and on the face of the contract—and I call this to your Honor's attention while we are at it—on the first page of the master agreement, refer to that again, right on the first page: [84]

> "* * * and the Building and Construction Trades Council of Reno, Nevada, and vicinity, and its various affiliates for the counties of Washoe, Storey, Ormsby, Lyon, Douglas, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka Counties, all affiliated with the American Federation of Labor, who accept for themselves, * * *"

Who must accept for themselves. In other words, each union, may it please the Court, on the face of the contract, must enter into its own contract with its employer.

Now let us go a little further. Let us see how many of these unions entered into that master contract and when they did enter into it, let us see how they entered into it. You have the hod carriers, you have the United Brotherhood of Carpenters, and then there is the Hod Carriers Union again, that is the same one, and I believe we have four. Now only four of these unions who are enjoined were parties signatory to the master agreement. Let us see what that said. We can use the first one.

That is on the hod carriers and near the bottom; now they accept the master agreement:

> "It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our [85] Union and/or the working agreement entered into between the General Building Contractors of Reno and Local 169."

Nowhere in this complaint is the jurisdictional fact presented of what is in the by-laws and the working agreement. Now that is the reason that Mr. McCarthy is here. He represents the Engineers Local No. 3. They are not members of the master agreement. They have their own individual contract with their own employers, and that is true with the exception of three of these unions, three I believe, four at the most. So what happens? Can the jurisdiction of this court, under the pleadings of this complaint—so far as those unions are concerned, they never signed the master contract, they are not a party, they have their own individual agreement with their employers, and still they are in here on what we say is an excess of the jurisdiction of this court, to answer to this court after having been restrained. Now I am talking the practical facts of the matter on this now and I will come to the law in a moment.

Now here is the California Association of Employers, the plaintiff in this action, who is not a signatory to that master agreement, who is not a party to these other agreements to Local No. 3, which is represented by Mr. McCarthy, who is not

a party signatory to the agreement entered into with any of the other unions, who is not even a signatory to the master [86] agreement. Nevertheless, they are the parties plaintiff. Now are they the real parties in interest on this? No. They are merely the bargaining agent, as it is shown on the face of the complaint and as they allege in their complaint and as the contract that was signed shows, that the unions must each for themselves accept sign the contract or must sign their own contracts and did sign their own contracts, with the exception of three of those unions, in my opinion, maybe four. So they are not the real parties in interest. The Building and Construction Trades Council of the City of Reno, they are not signatories and had nothing to do with the contract entered into by, let us say, the plumbers with their employers.

Now let us go just a little further, and I doubt whether this is material because after all we are in here on what? We are not in here on the merits of this case; we are in here on whether or not this court will continue this restraining order and that dates back to whether or not the jurisdiction was there at the time of issue and whether jurisdiction extends if continued, but I did think this should be stated to your Honor because it is common sense. Counsel says that he would be satisfied if we just say whether or not these apply or come under the Taft-Hartley Act. Now let me point out something, what this injunction has done. Nobody is complaining about it, everybody is going along, working [87] just the same, and your Honor please understand me when I say that these matters are presented to

the court, not with the feeling that anybody is going to be injured—let me assure your Honor that this has not in any way injured the unions and they do not feel it has, because they have gone along under the restraining order, but they do not want to be restrained and it is a dangerous procedure to restrain, because they are always subject to one hothead in a group of men which might be embarrassing to everybody else, on his own initiative and not on the initiative of the union, and do not misunderstand my statement that we are not going to contest to the limit the question of this restraining order. But now let us get down to this fact. Here is every union practically in this vicinity. Among them you will have, let us say, the teamsters. Now no one is going to contend that the teamsters, where they are working back and forth across the State lines, a lot of them, are not in a great many cases hauling interstate, not intra-state. Now that is one type of union. Now let us take another type of union here, and mind you, they are all tied up in this thing. We will take the laborers and hod carriers. All right. Here is a truck goes out here and gets a job to dig a ditch on a farm. If it is only a little ditch, he digs that ditch out there on that farm and the farmer is not under the Taft-Hartley Act, but that makes no difference, this restraining order ties up that [88] man just the same. Now every one is excluded who is in the agricultural business under the Taft-Hartley Act, everybody will admit that, but this injunction and prayer they are making, and what they are asking the order to say is that the man running the big Diesel across

the State line to San Francisco in the teamsters union, that he be put in the same condition with the man who is digging the ditch on the farmer's ranch out here where the union is exempt. Let us say it is a small ditch and they only had a few of the laborers out there, but the man had the contract and they are union men and dug the ditch, so the farmer said, "Now, I would like to have the ditch enlarged," so then they go and get the engineers, because they want bigger equipment, so he goes and gets a shovel and tractor and gets an engineer who is a union man also, and takes him out on the farm, and he goes out and works for that farmer and he is exempt from the Taft-Hartley Act. I am giving actual things that happen every day on these farmers' ranches. They say, "Well, we would like to have it boarded up or cemented." Now you are asked and you have, this court has, in its restraining order, restrained each and every and all of those people and counsel now comes in and says to us, "Tell us whether or not these are all under the Taft-Hartley Act" and no dead man or living ghost nor the highest court in the land can tell us that question, answer that question. Some may be and some may not be. It [89] takes two things to make interstate commerce. One is the type of work that is done by the contractor. For instance, let us take the carpenters, and they are working for Bill Smith today and Bill Smith gets a contract to go down there to construct a, say depot, for the Greyhound Bus Lines. He enters into a contract with the union. I would say that probably the carpenters at that particular time would be in, because they are

in interstate commerce activity. They work there for a little period of time. After that gets through, the contractor then gets a job to build a two-story house or three-story house. At the same time he is building this one over here, this job, he has another job over here where he is building a two or three-story house for a farmer on his farm and it is done under the same contract but on a different job. Now they are asking this court, which clearly this court can not answer, to say that all of these various unions, with their various activities, which takes in labor activities in this entire community, to say in one fell swoop, to say on every job they are performing, whether it be upon a farm, whether it be upon something clearly intra-state, to have this court say to every man on every job and every contractor on every job and to every farmer and to every business person in the State of Nevada, that every man who is a union man is under the Taft-Hartley Act and under interstate commerce. Now that is the purport of this [90] injunction as it has been issued.

Now let us see what declaratory judgment is supposed to be. I am just going to state this very briefly to your Honor. I will hand your Honor copies. What is the purpose of declaratory judgment? In many cases it has been held this, that the declaratory judgment act, Title 28, Section 400, is not jurisdictional, but procedural only, and it merely grants authority to courts to use a new remedy in cases without which they have jurisdiction. In other words, the jurisdictional facts must be present before the court has the right to use the

declaratory judgment. It just gives a new remedy for a court to act where there is a legal right or jurisdictional right and the court then can use this alternative, if it is called upon to do so. It just gives a new procedural method but it does not give any additional jurisdiction to the courts because the court's jurisdiction has been limited, and is limited, by various statutes.

Now the cases are cited, a number of cases I will have in this memorandum, which I will hand to your Honor. Now they ask you to come in and be their legal advisor. That is what this court is asked to do, tell them whether or not the Taft-Hartley Act applies, enter declaratory judgment. This is a case I have cited (reads from memorandum): And these are all very recent cases. I think they should be discussed just a second here. [91]

In this complaint the gear that they have expressed is upon information and belief. Now I want your Honor to bear in mind that, because I am going to come to that question as to the jurisdiction of this court to grant a restraining order where it is upon information and belief and not upon actual facts stated. The cases are quite numerous and legion on that. (Reads from memorandum, Louisiana case, 39 Federal Supplement, 567.)

Now if there is no controversy here you can't give then a declaratory judgment. If there isn't a labor dispute, there is no controversy. Where is the controversy? I want to reiterate that: (Reads: "In order to come within * * *.") Now that is the Caterpillar Tractor Company vs. International Harvester Company, 106 Fed. (2), 769.

I could go on and read you a number of cases, but I will hand to your Honor the memorandum from which I have been citing them. Now I want to leave this in the Court's mind and I want to hand to your Honor the latest United Supreme Court case upon this subject, and it came out—and we tried to get it out of your library but couldn't—it is the case of Bakery Sales Drivers Union vs. Wagshall, and it will be found in Vol. 92, No. 12, and the decision came down—it was decided on March 15, 1948, by the Supreme Court of the United States.

The Court: That is in the Law Edition?

Mr. Griswold: Law Edition advance opinions. But I [92] will hand this to your Honor during the noon hour if you want to look at it. It was the only one we could get in Reno.

Now, your Honor put your finger right square on the head of the cocoanut when you said, how are we going to overlook the Norris-LaGuardia Act? We can't. Council very carefully cited Section 103 or Section 105. He jumped then to 113. Now standing in the middle between those two—and in order to have a declaratory judgment he has to have some kind of a controversy, and the controversy we have here is between the labor unions and what is supposed to be the employers, if it is anything—so we must conclude that this injunction was issued against the labor unions and the only way you can issue it against the labor unions is to have a labor dispute. If there is no labor dispute here, then I say no court has a right to issue injunctions against labor unions who are involved, to keep them

working, as this does, and to hold the status quo insofar as this complaint asks for under temporary injunction, which we will discuss.

The Norris-LaGuardia Act, with reference to the issuance of injunctions, Section 107, sets forth: (Reads). Now that "actual knowledge thereof" is along the line of authorities that you do not issue temporary restraining orders upon information and belief, that there must be something besides information and belief to get it.

The Court: I think we will take our recess now, Mr. [93] Griswold.

Mr. Griswold: May I hand you this case, which has to do with this question, that is, is the Norris-LaGuardia Act changed by the National Labor Relations Act, the so-called Taft-Hartley Act, insofar as permitting individuals to get injunctions.

(Noon recess.)

Afternoon Session—1:30 p.m.

The Court: The court will come to order.

Mr. Griswold: May I proceed, may it please the Court, upon the assumption that your Honor has read the bakery case I handed to your Honor, the United States Supreme Court case.

The Court: I have not had a chance to read it yet.

Mr. Griswold: I asked that question because we want to shorten this as much as possible and not weary the Court, but that bakery case, you will note, was an injunction brought by a bakery and it was in the District of Columbia and they went over into Virginia, so those two states were involved

and so on—all those facts are rather unimportant, but if you will go over to subdivision (1) of the case, where the Norris-LaGuardia Act was—I think I marked it on there, if I may step to the bench I will point out the particular point I think is squarely in point—starting from there down to here—in that Supreme Court case. It is squarely on the point that we are now [94] making. Your Honor mentioned this morning in the Lewis case that was argued by counsel, that the United States government was involved, which is determinative on the argument of that Lewis case. In this case from the United States Supreme Court, and it was decided, as you will note, at a very recent date—is not in the books yet, March of this year—an individual was there asking that an injunction issue, the same as they are doing here. Now the Norris-LaGuardia Act that I started to read to your Honor came into question then on the issuance of injunctions, as compared with the Taft-Hartley Act, and whether or not the Taft-Hartley Act gave injunctive relief to individuals or whether or not it remained only in the hands of the National Labor Relations Board. Now you will find in the Taft-Hartley Act where the National Labor Relations Board have been given, by specific paragraphs, the right to get injunctions. Now they did not have that right as the National Labor Relations Board under the Norris-LaGuardia Act prior to the time of the passage of the Taft-Hartley Act, which put in Section 10 in the little pamphlet I have, which would be Section 160 in the United States Code. They put in the injunctive provision in favor of the National

Labor Relations Board. Now this case holds that the Norris-LaGuardia Act is clearly in force and effect and the Supreme Court of our country said, in that paragraph I pointed out to your Honor, that that did not change the Norris-LaGuardia Act permitting the issuance of injunctions to [95] private parties. The wording is so clear. It is only the National Labor Relations Board, not private parties, and there can be no question, the Supreme Court has spoken, in regard to that, and that paragraph that I have pointed out to your Honor that is marked is very short and it is very clear and it is entirely in point in this case. Incidentally, in that case, they refer to a number of other Supreme Court decisions and other decisions which I will not weary your Honor with, because they are all cited in that, in the event your Honor desires to read it. They uphold entirely the statement which was made in there and which I am stating from that act, and if you want to get the full picture and get the complete picture, you will note that the case, as determined in the Circuit Court of Appeals and from the report of that case from the Circuit Court of Appeals discusses at length the facts, plus the theory that we are now discussing with reference to the injunctive relief, and the Supreme Court upheld the Circuit Court in that respect.

I want to call your Honor's attention just to this, in that Section 107 that I was starting to read just before noon. You will recall that I made the statement that actual knowledge of the threats and the

committing of unlawful acts must be had by the parties that were to be restrained, and so on. In other words, information and belief is not enough, something that is not substantial: "That substantial and irreparable injury to complainant's property will follow." [96]

They say now that the only thing they want the Court to do is to say whether or not all these trades and unions and crafts are under the Taft-Hartley Act. They say now that there is no controversy, labor dispute. They say now that there has been no unfair labor practices, so far as the unions are concerned, committed. But still they are asking to have an injunction and then a restraining order. In order to have such, substantial and irreparable injury must result and "(c) That as to each item of relief granted, greater injury will be inflicted by the denial of relief than will be inflicted upon defendants by granting of relief; (c) That complainant has no adequate remedy at law," and I think they make that allegation as the conclusion in their complaint, but that is the only one I can see in the complaint so far under Section 107.

Now it is rather significant and important, I think—the Court will recall that the heading of this paragraph I am reading from says: "Temporary or Permanent Injunction." Now let us get on down to this temporary injunction, which is in the paragraph on page 63 from the section I am reading from: (Reads): "Such hearing shall be held * * *." Now none of that was done. "Such a temporary restraining order shall be effective * * *" and this was for a period of 7 or 10 days, I have

forgotten: "* * * and shall become void at the expiration * * *." In other words, at this time, under that section, the restraining order is void, and so on; but may I assure this court, on behalf of [97] the people I represent, we make no point of that, save and except that it came up in reading of this particular section of the statute, and whether it is in or is not in is of no importance to us at this time, because we want to have a determination out of this court, feeling that your Honor has the matter fully in hand and will give the law to us, so I don't urge that with the intent of saying that we can claim that we are not going to comply with anything that your Honor said until you say differently. (Reads): "No temporary restraining order shall issue * * *," which has been done, and the rest of it is not in point.

Now let us set down to the section with reference to the prevention of unfair labor practices and the power of the Board. Now we are getting into the power of the Board, and that is the National Labor Relations Board, and that is Title 29, Section 160 and is found on page 285 of the United States Code Annotated. I am not going to go further in that than to say this, that injunctive relief, and the reduction of the testimony to writing and so on is within the power and discretion of the National Labor Relations Board. In other words, if we were faced in here by the National Labor Relations Board, asking that an injunction be granted under the Taft-Hartley Act, we would then be clearly under the provision of Section 160 of the Taft-

Hartley Act, which is found in the supplement to the same volume, and it comes on page 27 of the supplement, and [98] is section 160. Now, mind you, this is a new section. It is something brand new. That is not in the Norris-LaGuardia Act, it is not in the Wagner Act, it is not in the Anti-Sherman Act, it is not in any of the acts up until the passage of the Taft-Hartley Act, where it was put in. That gives the Board injunctive power that under certain conditions, but Section 10 of the act, which is this section that we have here, has a number of subdivisions. It goes clear over to (1)—a, b, c, etc. Those sections, by the very heading of the section, "Powers of the Board Generally," "Prevention of Unfair Labor Practices"—"Powers of the Board Generally," you will note that the very first word, "The Board" had the right to do these particular things. It is significant and your Honor will find that this is true in reading of the Taft-Hartley Act, that every place in the Taft-Hartley Act where an injunction is permitted, it is specifically stated in connection with that particular power and that particular paragraph.

Now let us go down and see what other change was made in the Taft-Hartley Act, insofar as employer and employee is concerned, because that is in the Act also. Now I am referring to Section 301 as it was set out in the act, which is Section 185 and found on page 47 of the same volume that your Honor has there. Now it is sub-chapter 4: "Liabilities of and Restriction on Labor and Management." This is new. Now that gives the right, for the first time since the Norris-LaGuardia Act [99]

was in force and effect for a suit for what? A suit for damages, but you will note, if it please the Court, that the suit is merely for a violation of a contract for damages and that there has been left out of that sub-chapter any and all of the injunctive provisions that were inserted for the benefit of the Board. Now that is why, in the Supreme Court cases that I just referred to, that were passing upon the Taft-Hartley Act on this last sub-chapter 4, to determine whether or not, under sub-chapter 4 on suits that were filed under that sub-chapter, whether or not the injunctive relief that was denied under the Norris-LaGuardia Act were repealed or changed, whichever way you look at it, or whether or not the Norris-LaGuardia Act is in full force and effect, irrespective of this sub-chapter 4, and a ruling of the Supreme Court is that these private parties—now this is not referring to the Board, this is referring to the private parties—that the Norris-LaGuardia Act is not changed, insofar as personal transactions between the unions and the employer. In other words, the Taft-Hartley Act does not give to private parties—that is what these gentlemen are —the right of injunctive relief. It still remains under the old Norris-LaGuardia Act, and the Supreme Court has spoken on that and I think it has set at rest for all time a rather difficult question, up to the case I cited at this time of March. [100]

I have here a comparatively recent case that touches upon the question that your Honor very properly asked at the beginning, with doubt in

your mind as to whether or not the courts have the right to step in on these matters, or whether or not the administrative rights must be exhausted before the National Labor Relations Board. In other words, is this something that should be before the Board, or is it something that should come into this court and by-pass the National Labor Relations Board. Now your Honor asked this morning, and correctly so, as one of the points that is of a great importance in this jurisdiction question. That matter has been discussed and the Taft-Hartley Act did not change the powers and duties of the Board. As a matter of fact, the Taft-Hartley Act increased the membership of the Board. The Taft-Hartley Act gave the members of the Board broader powers than they ever had before and the Taft-Hartley Act did not, in any way, in any provision limit, insofar as the suits and jurisdiction was concerned, the Board. The matter has been passed upon by the Supreme Court of the United States in several cases, the Meyers case and one other that is cited here, but just a short time ago there was a case decided, and it is very short, and with your Honor's permission I will read it, out of the Sixth Circuit Court of Appeals, and it is the case of Union Brick and Clay Workers of America vs. Junction City Clay Company, and it is found in 158 Federal Reporter, 2nd Series, at page commencing [101] at page 552. The facts were that there was a controversy that had existed between these clay workers and between their employer, the Junction City Clay Company and the Logan Clay Products. The regional direc-

tor of the National Labor Relations Board came in and they got involved in it. They did not seem to be getting anywhere before the National Labor Relations Board, so they by-passed the National Labor Relations Board and the individual, the appellee—incidentally, Louis A. Penfield was one of the fellows in that, I just happened to catch his name as the first one, I see him sitting here. The case was dismissed and an appeal was taken. The appellee had prayed for an injunction, ordering appellants to cease from further acts in furtherance of the conspiracy, and a decree ordering appellants, the Junction City Clay Company and the Logan Clay Products Company, to cease and desist from refusing to bargain with appellee, and for treble damages and attorney's fees. That was brought by the union. Now let us see what the court said:

(Reads: "We think the order * * *") Citing the National Labor Relations Board Act. (Continues reading.)

Mr. Brown: Is that an action for declaratory judgment?

Mr. Griswold: No, this is an action for injunction. Now it doesn't make a great deal of difference to me whether you take an action for damage and take a restraining order on me. Counsel overlooks this fact, we are in here on order to show cause. We have been restrained and retained and I don't care [102] whether we are enjoined by a redhead, a black-head or a blonde, you are still enjoined and if you can't, you can't, and if you can, you can, and as I read in the cases,

declaratory judgment is only a procedural act and is not a jurisdictional one, and those cases have already been cited. Now we are enjoined and if you can't by-pass the Board, the National Labor Relations Board, you can't by-pass them. I don't care whether you are going to try to do it with declaratory judgment and suit for damages, or a plain, ordinary old injunction suit. They either have jurisdiction or they haven't. If they have jurisdiction, they have what this court says, exclusive jurisdiction, and that is the ruling of the United States Supreme Court in the Meyers vs. Bethlehem case, which is cited under the first section I gave you. That is the holding in the Supreme Court case of the Newport News Shipping * * * vs. * * *, which is cited under the sections I have read here to you. Those cases uphold exactly what the Circuit Court of Appeals said. If any one can point out to me in the Taft-Hartley Act, or in any other act that has been passed since the Norris-LaGuardia Act, where there is any provision in that, either directly or indirectly, changing the injunctive provisions, except in one respect that I have mentioned, that is an injunctive relief that can be had by the Board, they read it more closely than do I, and I have read to your Honor and pointed out to your Honor sub-section 4, that shows what [103] can be done between individuals under the Taft-Hartley Act and that is all there is in it and that is merely suit for damages, without anything being said about injunctive relief. I do not care what counsel says about coming in under declaratory judgment act. What difference

does it make whether we are in here under declaratory judgment act or under damage action. We are in here at this hearing for one purpose and one purpose only. Our time to plead to the other actions has not expired. It does not expire for 20 days. We are in here in compliance, and gladly so, with your Honor's order to appear at this time and place and show cause, if any we have, why this restraining order that we have on us now should not be made pendente lite and then afterwards ripen into a permanent injunction, and that is all we are trying here now. We will meet the other issues when those issues are presented. We are discussing only the jurisdiction of this court to grant this restraining order and to keep it in force and effect.

I want to call just briefly—I do not want to take any more time because Mr. McCarthy is much more capable and versed and knows the law and the facts equally well with me, and the law a lot better, and I want him to have his time without wearying this Court, but I want to call your Honor's attention to this, and I would like to have your Honor turn to that restraining order that is in here. I won't have to read the fore part of it, but I do think I should call to your Honor's [104] attention this, starting with the "Now, Therefore," on page 2. Let us see what this has done: (Reads: "Now, Therefore, * * * 18th day of May, 1948." Now, your Honor, we can't write a letter and keep it in effect. We are restrained from keeping in effect a letter we have written. I don't know whether they really meant what they said there,

I can't believe they did, because in that letter you find at the conclusion of it this statement—and I have always understood this is what they wanted, I do not know, maybe not, I thought I did until I got over here today—and that is this offer on the last page of the letter of May 18th, which is exhibit attached to the complaint, we find this:

> "You may be assured that the Reno Building Trades Council will be more than willing to further negotiate or consider any counter proposals which your organiaztion may wish to offer."

Now under their restraining order we are restrained from carrying that into force and effect. We can not negotiate with them, we can not come and see them, we can not talk with them, we can not do anything under that restraining order. This is our letter of May 18th to them, asking them to submit a counter proposal to us and let us negotiate further in this matter. Now what kind of business is that? We ask them to negotiate, we want still to negotiate, but we can't [105] even appear and start in to talk to them on any proposal or anything else that may come up under this restraining order, to come to any kind of understanding or agreement, and it would be, technically at least—I wouldn't hesitate to say, well, let's sit down and talk it over—but technically we would be in violation of your Honor's restraining order in doing so, because they tell us we can't keep in effect that letter, can't keep in effect that paragraph, we can't negotiate, we can't do anything to get the matter

straightened out among the various crafts and various unions who are signatories to contracts, and only three of them signatory to the contract that is attached to the complaint. I do not think counsel intended anything like that. He couldn't have.

Now let us go on: (Reads from order—"* * * and from issuing or otherwise * * * during the pendency of this action." Well, although the powers of courts are broad, the court has no right to write contracts for people. In other words—I know your Honor has this in mind clearly, but just to be on the safe side and so counsel will understand the position—the unions and the men—first let us get down to basic things—the men who are down underneath the unions, they are asking for wages and hours and working conditions. Now this Court nor the Supreme Court of the United States nor any other court can write a contract for them and say, "This is going to be your contract." You can say, you have to live up to a contract, [106] but courts do not turn themselves into the mediators or writers of contracts between various parties. Now they say to us in this that we are restrained from finally saying that the contract is void or will be terminated; then they must want to keep the contract in force and effect. Now in their letter, in reply to this letter here, they say that they are not going to violate the law; so what have they done? If the contract is in violation of the Taft-Hartley Act, or any other act, they have called upon this court, and have gotten a restraining order that has kept in force

and effect the illegal provisions of that contract. If that contract is in violation of law, they have continued that violation by their restraining order, for a period of ten days at least, and now they are asking to keep it into full force and effect during the trial of this action, and then to make it permanent.

Mr. Brown: No, we are not asking for permanent injunction.

Mr. Griswold: Well, you want it then while the case is on and it will take a long time. It makes no difference whether you violate the law one or five or twenty days, you are in violation if the contract is in violation of law, you keep it in violation by this restraining order. I could go on and discuss a lot of these points, but as I say, I want to let my associate in this matter, who represents one of the [107] unions, finish and cover other points, and I thank your Honor for being so courteous to me.

Mr. McCarthy: May it please the Court, one of the nice things about being a lawyer is sometimes when you lose cases you find out later on you were very lucky. It so happens that quite a few years ago while my associate, W. H. Metzger, a long-time member of this Bar, was alive, we engaged in some litigation, finally ended up before the Ninth Circuit and Judge Denman, who was senior judge at that time, was kind enough to dispense entirely with the rules and gave us what amounted to an entire day for argument, being a case of first impression. I think Judge Denman's decision in that case is determinative of this one.

In that particular case I took the position Mr. Brown and petitioners take. It was an action for declaratory relief. It was an action in which we requested an injunction restraining the teamsters from interferring with our relations with the employers, an action in which we asked the court to direct and order the employers to bargain with the brewery workers. It will be found in 106 Federal Reporter (2), at page 871. In that case we argued that since the contending union and the employer admitted jointly, and without reservation, that the brewery workers was the choice of 100 percent of the employees, that it wasn't necessary that we go before the Board. We argued also that because at that time the Board was refusing to hear any case [108] where the unions involved were both members of the American Federation of Labor, as these unions were, they felt it was an internal family squabble and should be settled by the parent organization, and the Board refused absolutely to exercise its discretion, we said, first, everybody admits we have the right; the Board won't hear us because it won't exercise its jurisdiction. What did the Circuit Court say? They said this: (Reads: "The National Labor Relations Act provides whenever * * *") In other words, the Board, having the power, it was up to the board to decide whether it was going to use it or not, so that even though, in that case, the Board wouldn't act, they held that we couldn't have it. They said this: (Reads: "Since both the employees and the brewery workers union * * *".)

The Court: What volume is the case from?

Mr. McCarthy: 303 U. S. 41. This case says it was not the power of the employer, if I recall correctly, to enjoin the Board from proceeding with certain hearings. They held that of course the district court did not have it. Now they said further: (Reads: "The decree declaring the brewery workers union to be the bargaining agent of the brewery delivery men and ordering the brewers to deal with that union is reversed and the complaint and cross-complaint other than the teamsters ordered dismissed as to their claim for declaratory relief.") In other words, we had obtained from Judge [109] James in the district court an order directing the employers to bargain with us. They reversed that order specifically.

With respect to the injunctive powers of the court, the court said: (Reads: "The district court held that the demand on the brewers * * *") Insofar as they are unlawful, the court then proceeded to set out provisions in the Norris-LaGuardia Act that must be complied with. That decision came down in 1939 and there we had asked and obtained an injunction directing and requiring the employer to bargain with the union. We had asked and obtained a ruling that we were under the act, that we were the qualified bargaining representatives and the employer must deal with us. The Circuit Court said as long as Congress set up an administrative tribunal to answer those questions, they can not be answered either by this court or the district court, and reversed and sent it back in its entirety, with the suggestion that we may have had a case

under the Sherman Act by way of violation of the anti-trust act, but that we did not have any for declaratory relief.

Now I would like to ask the Court to bear with me just a few minutes while we go throught this complaint from the standpoint of the operating engineers Local Union No. 3. Local No. 3 covers the territory of northern California and northern Nevada and the entire State of Utah. Local No. 3 has around 15 to 16 thousand members. Better than 95 percent of all heavy construction is operated by the members of that [110] union in this area. Local No. 3 writes agreements. We have just completed one with the Associated General Contractors covering all of the northern part of the State of California and it was signed just before I left San Francisco to come here. Local No. 3 is named here as a respondent or defendant and yet you can search this record from beginning to end and you can't find where Local No. 3 has anything to do with this case at all, and it is only one of a number of unions in the same position.

We go to the exhibits attached to the complaint. I don't think that counsel will question my statement of the law to the effect that when you make an allegation in a complaint and then attach an exhibit, the exhibit controls the allegation, if it is a writing; so he alleges that he has an agreement with these defendants and then he attaches a copy of the agreement. We assume, of course, it is a complete copy. We must, in fact, for the purposes

of this motion to dismiss here, assume the truth of everything pleaded, the same as under a demurrer or anything else. So this agreement recites that it is made by and between Reno Employers Council for and on behalf of the General Contractors, Subcontractors, who have signified their approval thereof by the attached authorization attached hereto, and hereinafter referred to as the Employer. In other words, the plaintiff in this action is an agent. No where in this complaint does the plaintiff plead [111] it is an agency coupled with the case. This Reno Employers Council does not employ any operating engineers, does not employ any plumbers, laborers, or anybody else. It pleads itself here that it is an agent, authorized to negotiate an agreement for certain people who authorize it to. It says: "* * * the Building and Construction Trades Council of Reno, Nevada, and vicinity, and its various affiliates * * *". Well, now, Local No. 3 is an affiliate of Building Trades Council—of various counties in northern Nevada, "* * * who accept for themselves and for the various crafts councils and for their various local Unions, which have jurisdiction over the work in the territory hereinabove described, hereinafter referred to as the Union." They they come along with this paragraph:

> "Each local Union authorizing the acceptance of this agreement does so by attaching a stipulation to that effect, signed by its duly elected officers, which will be attached hereto, and becomes a part hereof."

So what is the situation of the Building Trades Council? It, when this agreement was negotiated, wasn't even an agent. It wasn't acting for and on behalf of its membership. It sat down with this Employers Council. It said, "Look, we will draw up an agreement, one that the Council likes, then we will take that agreement to our local unions and if they want it they can accept it, sign it, and it becomes their agreement [112] and that is the exact language that is in the agreement: "Each local Union authorizing the acceptance of this agreement does so by attaching a stipulation to that effect, * * *".

Now notice it recites that the Reno Employers Council had been authorized to enter into this agreement at the time it was negotiated:

> "This Agreement made and entered into by and between the Reno Employers Council for and on behalf of the General Contractors, Subcontractors, who have signified their approval thereof by the attached authorization attached hereto, * * *"

And later on, when you get into the agreement, you find that it recites—in the complaint rather, it recites in the complaint—on page 5:

> "That each of said members did then and there, and prior to the execution of said contract, authorize the Reno Employers Council as its bargaining agent to enter into said contract for and on behalf of the members thereof."

That wasn't the situation with respect to the unions who subsequently adopted this contract and made it themselves. So we have this situation—and I think we have to analyze these matters as lawyers and not just merely advocates—we have here a contract. The plaintiff says, "This is my contract." The contract says it is not your contract. The contract pleaded [113] by this plaintiff says that this plaintiff was an agent who made an agreement for a group of contractors and that it is their individual agreement, the contractors. Now if I go out and sell an automobile for the XYS Sales Agency, say I sell it to Mr. Smith, and Mr. Smith does not pay for that car, the salesman doesn't bring the action to collect the money. The Sales Agency, the corporation that sold the car, sues for the money, because it is the real party in interest. There is no pleading here that this Employers Council holds a general power of attorney, with authority to sue, and even if it did, this is not an assignable action, the same thing they are bringing here. So we have a situation here where an agent, who negotiated an agreement, comes into this court and asks that the acts be declared thereunder. For example, I am an attorney. I negotiate a contract with another attorney. I say, this contract is approved for form. I take it to my client. I say, "John, I think it is a good deal, you had better sign it." It is a satisfactory legal contract and John signs it. Then a dispute arises under that contract. Do I sue the other attorney to find out what the contract means, or

do our respective clients sue each other? And yet the position of the California Employers Council in this case is no different than attorney and client, the position of the Reno Building and Construction Trades Council is no different than that of attorney and client. It acted as agent throughout [114] this entire agreement. It is clear that they were acting as agent. It is clear that the Employers Council had authority when it sat down to negotiate. The Reno Building and Construction for this agreement had no authority when it sat down to negotiate. All it said was, "We will take this to the local unions and when they approve it, it is their agreement," and that is what was done, because if you will turn to the back of the agreement, you will find the stipulation of the hod carriers and common laborers:

> "We the duly authorized officers of the Hod Carriers, Building and Common Laborers Local Union Number 169, an affiliate of the Building and Construction Trades Council of Reno, do hereby accept and subscribe to the Master Agreement entered into between the Building and Construction Trades Council of Reno and the Reno Employers Council."

Then they went on to say:

> "It is specifically understood that the terms and conditions of the Master Agreement shall not supercede any provisions and by-laws of our Union and/or the working agreement entered into between the General Building Contractors of Reno and Local 169."

Now if you go back again to the agreement, let us see how they sign it: [115]

> "In Witness Whereof, the parties hereto have hereunto set their hands and seals by their respective officers thereunto duly authorized this 21st day of May, 1947.
>
> CONTRACTORS LISTING,
> ROY B. FLIPPIN,
> Representing General and/or Independent Contractors"

Now when a corporation signs, the officer affixes the seal of the corporation and their signature, the corporate name, by virtue of resolution passed by the board of directors authorizing and directing it. This is not a corporate signature. This plaintiff is the corporation and so pleads itself. It did not even go under its fictitious name, the Reno Council.

Now lawsuits are serious matters. They are expensive. The men who make up these unions are the people who foot these bills, and yet we are brought into court on an agreement that we are not a party to, that it appears on its face we are not a party to, that this plaintiff is not a party to, and we are, at the same time, restrained in our operations. Whether your Honor's order would extend to the three states in which we operate, is something we paid no attention to, because we intend to obey it any way. We have no quarrel with obeying the order. That does not say that we

concede, for one moment, that on this complaint this court has jurisdiction to make it.

Now what was the signature of the Reno Building [116] Trades Council:

"Harry A. Depaoli,
Pres. Nev. State Fed. of Labor. Representing
Reno Bldg. Trades Council and vicinity"

But the Reno Building Trades did not agree in this agreement to do anything. It does not agree to it and is not in it.

Now this agreement covers a lot of territory. When they say "what we want your Honor to do is to say whether we are under the act or we are not", they are not being very fair to the court or fair to counsel. The National Labor Relations Board was asked the question, "Is building and construction under this act?" and the Board said, "Gentlemen, we have now been made a judicial power of the United States governmentfi quasi-judicial. It is our duty to decide cases as they arise upon the facts, the same as the courts of the United States have for years, and all other competent law courts, and we can not tell you, blanket, whether this industry is under it or not. We can only decide specific cases involving specific facts as they come before us and out of our numerous decisions eventually will arise a rule of law," which is the case with everything. That is the common law system of operating. It is true under Roman law they operate in a different fashion.

Now here is the problem. I made up a list for Mr. Denham's office of various contracts written

for Local 3, contracts covering different type of work, with different type of [117] employers. That list, your Honor, is one page long, not the names, just the types and kinds of work. Now this says here that this agreement shall cover all work within the jurisdiction of the unions signatory hereto, as recognized by the Building and Construction Trades Department of the American Federation of Labor. That is, it is negotiable. Well, I will say quite frankly to your Honor that we could take evidence in the case of any one of these unions four hours a day for four months and we would never complete the description of the work performed by that one union. Just take, for instance, how many types and kinds of jobs is a pick used on, or a shovel, or a hammer, or a saw. Yet, your Honor, every one of those jobs must be described under the form of this complaint. The employers must also be searched, because it is the employers' contract that, to a certain extent, determines the coverage. That is why the Board was set up in the first place. When you come before the Board, you come in on a question of unit, and this is something that apparently has not been given any particular thought. You say it is not an unfair labor practice to refuse to bargain if the unit desiring that you bargain is wrong, and yet under this act the Board, and the Board alone, is authorized to determine what is or what is not an appropriate unit. In other words, this is the situation—to refuse to bargain collectively with an employer, providing he is the representative of his employees, subject [118] to the provisions of

sub-section (a). Now, "The board representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining with respect to the rights of plaintiff." Then we come down here: "The Board shall decide in each case whether, in order to insure employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

Now these people are in here saying, "You are going to bargain with this Council and the unit." What is it? It is neither a craft unit nor an employer unit. Some of these men are engaged in material supply work, some of them do on-the-job cite construction. I say quite frankly to your Honor, in our opinion, they do not constitute an appropriate unit under this act, for the purposes of collective bargaining. Now that is a decision which must be made by the Board and until the Board decides that this plaintiff constitutes an appropriate unit, for the purposes of bargaining, the union has no duty to bargain with it. It isn't a question whether this industry is under the act or not. If this law applies to these parties, the only thing that has to be done is for the plaintiff to go down to the 20th Region, call on Mr. Penfield, and [119] say, "I would like to file an unfair labor practice charge against the Reno Council for refus-

ing to bargain." One of the first questions Mr. Penfield would ask is, "What is your unit?" Well, here perhaps the appropriate unit is our membership. When that case comes on for hearing, we would have the right to litigate the appropriateness of that unit. We could go in there and argue that the unit was inappropriate. If the Board agreed with us, we would be under no necessity to bargain with these people whatsoever. Now this court may not take over those powers which have been granted to the Board itself.

The situation, your Honor, has come up a number of times here in representative cases, where the question is who represented the employees and who did not. That is what the District Court said in 38 Fed. Supp., 321, at page 322: (Reads: "If this court were to inject * * *") Now then substitute the word "unit" and you have the situation as it exists here. The Board alone is empowered with the authority to determine the appropriate unit. The act imposes a duty on unions to bargain with the employer in good faith in an appropriate union. If it is not an appropriate unit, there is no duty to bargain, and yet they are asking this court to make that decision for the Board.

Getting back once again to the agreement. You can not find any approval of this contract by Local No. 3. Local [120] 3 of the operating engineers—we are now assuming the complaint to be true—it does not appear on the face of it ever executed this contract or authorized anybody to execute it for them. The exhibit shows that two unions of

numerous union defendants signed it. Local No. 3 did not.

In addition I would like to direct your Honor's attention to the allegations made here on information and belief. On page 9:

> "That your petitioner is informed and believes and therefor alleges the fact to be that respondents * * *."

Now that includes Local No. 3:

> "* * * will not negotiate or bargain upon any other assumption than that they are not covered by the provisions of the Labor Management Relations Act of 1947 and that they have determined that they will not comply with the provisions of Section 8 A 3 of said Act; that your petitioner is informed and believes and therefore alleges the fact to be that the position of respondents whereby they have contended throughout their negotiations that they are not covered by said Labor Management Relations Act of 1947 * * *."

Aside from the fact that it is a complete misstatement of fact, that isn't the point now, we think if your Honor would take a [121] look at C.J.S. 43, Section 195, page 902, you will find the rule stated thusly: (Reads.) Citing cases, some of them federal.

Now when we come down to this other section I find myself in great difficulty. Counsel says there is no unfair labor practices being committed around here and yet it is a complaint that alleges on

information and belief there is. He says there is no labor dispute, and yet it is a complaint here that says it is. They say this on page 11:

> "That any interruption of the status quo of the parties hereto will interfere with the free flow of interstate commerce by reason of the interruption of the buying, selling, transportation of lumber, paints and other materials, and labor between the States of California, Nevada and others by reason of slow-downs, strikes and other forms of coercion which your petitioners are informed and believe and therefore avers to be the fact that said respondents will employ immediately upon the termination of the master agreement and other contracts in the event that petitioners do not meet the demands of respondents contained in their letter of May 18th, 1948; * * *."

Now I think, just as the respondent, operating engineers, in objecting to the court's jurisdiction, is bound by the allegations of this pleading, I think the petitioner is bound by [122] them also. The statement of counsel to the effect that the facts are that as alleged in his pleadings, can not be sufficient at this stage of the game to save the pleadings. In "Labor Disputes and Collective Bargaining", by Ludwig Teller, Vol. 1, we find the following—Mr. Teller is one of the leading authorities today on labor law: (Reads: "The following labor activities have been held * * *.") In each instance he cites the applicable case. There isn't any doubt at all that these acts which are here charged are acts

which constitute a labor dispute under the terms of the Norris-LaGuardia Act, and there is incidentally no compliance with the procedure provisions of this act. There is in addition to that no allegation or thought that the police force of the State of Nevada and the City of Reno is insufficient to control the violations supposed to be occurring, in order to get an injunction under that act. In addition to that they say this:

> "* * * that unless the temporary restraining order herein prayed for is granted by this Court, the issue will become moot and the contractual relationship between petitioners and respondents cease before this Court has had time to consider and determine the jurisdiction of this Court to entertain this cause between these parties."

So that this record may be clear, I would like to make a formal objection at this time that the petition in this [123] case is defective and that it asks this court and seeks relief directly contrary to the 5th and 14th amendments of the Constitution of the United States. It flies directly in the face of due process and it wipes out any protection that the government has placed around the sanctity of contracts. If this contract, by its terms, expires on a certain day, that is the agreement of the parties and I say most respectfully that no court has the power to change that termination date. If there has been some mistake, these people may bring an action for reformation of the instrument, and if they are entitled to it, the instrument will be

reformed by the court, but by reforming the instrument, the court does not write a new contract for the parties. It simply decides judicially what the contract always was. This court has been asked and what is said here is, that the expiration date of this agreement be arbitrarily, by this court, changed and the contract extended without the consent of one of the parties to the agreement. The National Labor Relations Act, the Norris-LaGuardia Act, and declaratory relief act, there is no act that gives to the District Court of the United States that power. As a matter of fact, we submit that an exercise of any such power is directly in conflict with the 5th and 14th amendments, and I say so seriously and want to make it absolutely plain, where Local 3 is concerned we are raising that constitutional question at this time, the first hearing on this matter, so [124] that we may, if necessary continue to pursue it.

I direct your Honor's attention to two recent decisions—I have not the citations on them because they are in the advance sheets—one is in the District Court in northern California, International Longshoremen and Warehousemen Union against —, a decision in 21 N.L.R.R.M. at 2635. Here is what it says, reading from the syllabus: (Reads.) In other words, the union here came in and said, "This employer won't deal with us. He won't bargain with us." That is what these gentlemen are saying.

Mr. Brown: No, we don't.

Mr. McCarthy: Except on its own terms, which is the same thing. I mean, a qualified refusal is a

refusal. If you attach what is claimed to be a qualifying condition to your act, it is a refusal just the same; otherwise it is words. This union comes in and wants the court to order the employer to bargain and incidentally that is what is being sought here. We are being ordered to continue our agreement, we are being ordered not to do various things.

Now what did the court have to say, going to the text of the opinion? They said here: (Reads: "Prior to its amendment the National Labor * * *.") In so deciding, of course, the court is only following the long line of decisions, some of which have already been called to your Honor's attention.

There is one other point I think we should direct your [125] Honor's attention to and I would like to direct your Honor's attention to the case of Alabama State Federation of Labor against McAdory, found in 325 U. S., 450, 89 L. E., 1725. I think there was quite some considerable difference of facts; however, the legal principal is the thing we are interested in. Of course, they do arise from the facts. It seems that we have in the State of Nevada an act passed in 1917, No. 10,473, which makes, or purports to make, it "unlawful to enter into any agreement, either orally or in writing, by the terms of which an employee of such person, firm or corporation, or any person about to enter the employ of such person, firm or corporation, as a condition for continuing or obtaining such employment, shall promise or agree not to become or continue a member of a labor organization or shall promise or agree to become or continue a member

of a labor organization." That is a State statute. Now whether that State statute is applicable to this case or not may not be, by this Court decided in a declaratory relief action of this sort. (Continues reading from Alabama State Federation of Labor case "Petitioners say there is no * * *.") Yet, your Honor, if this State statute is applicable to this contract this plaintiff has presented to your Honor with an illegal agreement, which this plaintiff is asking your Honor to declare his rights under, so that before we can even get down to declaring any rights of duties under this agreement, one of the problems [126] that would have to be met is, did the law of the State of Nevada at the time this agreement was entered into make the entering into that agreement an illegal act? Was it a violation of the State law? But your Honor can't pass on that in a declaratory relief action, because the Supreme Court said the State of Nevada must first construe that statute, and yet they have construed the statute in order to consider the contract. So I think your Honor must take judicial notice that that statute, as far as it was in full force and on the date signed and one of the things involved, is legislation, especially in a labor union.

Mr. Brown: In interstate commerce.

Mr. McCarthy: Not necessarily so, no, because the N.L.R.B. provides in the act itself in those cases where a State has more restrictive legislation than the N.L.R.B., then that restrictive legislation is adopted by the Federal Government as its legis-

lation. So much so, and Mr. Penfield will bear me out, that the Board has has elected that if elections be held in the State of Nevada by reason of existence of that statute, a determination is made, because that statute is made controlling by the National Labor Relations Act.

Mr. Griswold: Personally I question whether or not that is one of the issues we have before us at this time.

The Court: Well the only issue the Court is interested in at this time is whether or not this restraining order should be continued. As far as [127] the merits of this matter is concerned, it is not before the Court. It is merely on Mr. Brown's motion to continue the order.

Mr. McCarthy: We respectfully submit that the Court is without jurisdiction to continue the order, and particularly where Local 3 is concerned, it is apparent from the face of complaint, that we are not even parties in this action, as are a lot of other unions. We respectfully submit that the order should be quashed, vacated and set aside.

(Short recess.)

Mr. Griswold: Just this, if the Court please, I stated I would have for your Honor this list of authorities and to hand opposing counsel, and at this time may the record show that I do so. This covers points which I discussed. In order that the points that have been raised by both Mr. McCarthy and myself may be set forth, at least partly, I at this time ask the Court to file our formal written motion to dismiss, upon the grounds and for the rea-

sons that we have heretofore set forth, and may the record further show——

The Court: Motion to dismiss the action?

Mr. Griswold: No, dismiss the restraining order, on the points we have argued and those points only.

Mr. McCarthy: May we at this time have the record show that Local 3 joins in that motion.

Mr. Griswold: And may the record show that the other [128] defendants join in the motion, which I do not believe is covered in the motion that was filed to dismiss the restraining order, that was made by Mr. McCarthy, so that we are together on the various points.

The Court: So understood.

Mr. Penfield: May it please the Court, I would like to state at this time, so far as general counsel is concerned, in respect to this issue of the Court's jurisdiction to grant injunction for relief, I am in accord in substance with what counsel for the defendants have said in that regard. It is our position that the Board's jurisdiction is exclusive, insofar as injunctive relief is concerned, under the Taft-Hartley Act. I am not concerned with any other aspects of the case at this time.

Mr. Haugh: May it please the Court, the statement made by Mr. Penfield has emphasized the difficulty, I think, that is confronting us here today, in that we have heard and have had exponded some very excellent law upon factual situations and cases that have no application to the matter now before your Honor. Now whether or not the Board has exclusive jurisdiction, is necessarily dependent upon

whether or not the Act applies to the operations of the parties in this hearing, and that is the question before you. They are pre-supposing that your Honor is going to decide this case in our favor, apparently, by making the arguments that have been made, and [129] in these cases where injunctions have been denied, you will note that each of them involved a labor dispute within the meaning of the Norris-LaGuardia Act, or they were cases in which the parties were seeking relief through the stopping of unfair labor practices, or other matters under and by virtue of the rights granted in the Labor Management Relations Act, and it is our position that until your Honor has decided this case, those cases are not in point. Now it is entirely possible that in the future we may become involved in a labor dispute and then we must conduct ourselves in accordance with the statutes and the law that has been presented to you here today, but until that labor dispute exists, they do not apply.

Now we take the position, if the Court please, that we are attempting in this action to have your Honor determine the application of this law before we have a labor dispute, before the things that were concerned in these other cases happened to us. We do not want a labor dispute to occur. That is the reason we are here. We want your judgment and your understanding of whether or not this law applies to our operations and the relationships between these parties, so that, if possible, we may avoid a future labor dispute that could arise under its application or non-application. We want to

know, so that we can guide ourselves accordingly and prevent the labor dispute about which they [130] complain in their arguments.

That same thing is true under the Nevada law. It may be that we will have to have a lawsuit to find out what the Nevada law means, but that is tomorrow or the next day or some place down the road. It may be that we will have to have a lawsuit with the National Labor Relations Board to find out whether they can say that in those cases that have laws similar to the statutes of Nevada, they will not hold elections, but that is another case and it is further on down the road, if at all.

My reaction to what has occurred here today in the arguments presented is that we have vaulted completely over the issue before you and you have assumed that we are involved in cases wherein these parties are seeking to assert some right under this act. We are not doing that. We want to know whether or not it does apply. Then, if it does, we can assert those rights in the proper way. If it doesn't apply, where is the application of the Norris-LaGuardia act, where is the exclusive jurisdiction of the Board? There isn't any. They have jumped clear over the true issue before you.

Now we have heard a great deal about the Norris-LaGuardia Act, and I think it would be well to give some consideration to it. First of all, we do not think there is a labor dispute, we do not think this is a type of case wherein the Norris-LaGuardia Act applies in any way, because [131] we are asking your Honor to tell us simply whether or not

a federal statute applies to the operations as set forth in this petition. That is all.

Mr. Griswold: May I ask through the Court a question of counsel?

The Court: Yes.

Mr. Griswold: Why have we got a restraining order injunction then? Why are we in here at this time discussing it? Why slap us down with that kind of procedure?

Mr. Haugh: I will be glad to answer counsel. I have been wanting to do that ever since he first made that remark I call attention to the last page of the contract attached to the petition as Exhibit "A":

> "This agreement shall remain in effect for a period from May 24, 1947 to and including May 21, 1948 and shall continue to remain in full force and effect thereafter, except as to wages and hours, which may be subject to change or modification by a thirty (30) day notice being served in writing by either party upon the other party for a desired change in this Agreement."

That is the termination clause in this contract.

Now I understand there have been negotiations, it is so alleged in the complaint and these parties are in the process of negotiations, or have been and the question has arisen [132] between them as to whether or not the Taft-Hartley Act applies to their operations and their relationships. There is even a difference of opinion among the unions. Some say it does, some say it does not. The em-

ployer says we think it does and the National Labor Relations Board, through Mr. Denham, says "I don't know." That is the problem before your Honor, does it or doesn't it? That is all there is to it and there being no labor dispute, it being a simple request for declaratory judgment your Honor has the inherent right regardless of any law to maintain the status quo while you decide that question. That is what the Lewis case says, and I think it is sound law. I think it is good. I think you should have the right and by the way, I don't see why these respondents are complaining. They are continuing to operate as they have for the past year, they are still working, they haven't been hurt according to counsel representing them, there isn't any damage being done to them, these poor ditch diggers and teamsters driving the trucks—I don't mean teamsters. They are one union that agrees with us. But they have not been hurt in any way because the contractual rights contained in that instrument are continuing. Because of things that have happened during these negotiations, we have alleged that it was expected that there would develop trouble and we asked your Honor to issue his order, staying the proposition, maintaining it as it is until this question is answered that is before [133] you, whether or not the law applies. I will tell you why we did it this way. We were hoping thereby to avoid a labor dispute, to get this troublesome question answered by a competent authority before we became embroiled in a strike, to determine whether or not we can force somebody to ac-

cept it, do it legally or otherwise. Now that is our position. As I say, I think it is fundamental within the right of this court, to protect the status quo under this contract. We are not seeking to enforce it. We are not seeking to change its terms. We are not asking for relief under the Labor Management Relations Act. We are not charging any unfair labor practices. We may later in some other proceeding, either before the Board or before some court, but that is not the charge here. We are not asking that now. All we want your Honor to do is to tell us whether or not this law applies to our operations, and during the time it takes you to give it consideration, you maintain the existing relationship between us by issuance of the temporary injunction.

Mr. Brown: Your Honor, this morning I neglected to give you the United States citation of this Columbia River Packers case. It is cited in Vol. 315, U. S. Reports and it commences at page 143.

Now if the Court would bear with me just one moment. This is an action decided in 1942, which I think suggests that there are distinctions where the jurisdiction of this [134] court, even in certain cases which on their face may appear to be, at first blush, labor disputes and they said the Norris-LaGuardia Act does not prohibit injunctive power, and if the Court will bear with me just one moment—this is rather interesting. Mr. Justice Black wrote the opinion of the court: (Reads—315 U.S.—"* * * The jurisdictional requirements of the

Act."). And I might say what those are under the Norris-LaGuardia Act. They are those specific findings of fact enumerated in Section 107, which Mr. Griswold has so ably brought to the Court's attention. In other words, the Norris-LaGuardia Act, Section 107 Title 29, even in labor disputes it does not prevent the Court from hearing testimony, going ahead after proper findings of fact, that certain things exist under 107(a), (b), (d) and (e), but in this case Justice Black says: (Reads: "The jurisdictional requirements * * * to issue the injunction sought."). Now then it is pointed out that: (Reads: "Respondents * * *").

Now I appreciate the fact, may it please the Court, in anticipating the question of counsel that is it not a true fact that the facts in the case at bar are entirely different than those in this case. Certainly they are, in this respect. Our people are not independent contractors, but may I respectfully suggest to your Honor the point that we make by this case is this—that it is not the only case in which employers and their employees are parties to an action in a federal court that gives rise to [135] the application of the Norris-LaGuardia Act, and I respectfully submit to your Honor, as Mr. Haugh has indicated, the only dispute in this case is this, does the federal act apply to this particular industry under the contract, Exhibit "A," or does it not. Now there is, we submit, no controversy there concerning the terms or conditions of employment or concerning the association of persons seeking to arrange terms or conditions of employment. We do

not contend that these people are not representatives of the union; we do not contend that they have refused to bargain; we have not contended that there is any dispute at all; and may I respectfully suggest that there is one thing that a very sound lawyer told me not long ago, in reference to a problem of research on the tax law. I had been reading a lot of decisions and every decision had different facts and every case had apparently different findings in the field of taxation and different wording, and he said, "The trouble is with you, Brown, if you desire to find the answer to a problem on income tax, go to the Internal Revenue Act. The act is a provision of Congress which prescribes the rights and liabilities of the people involved in controversy." Following that, what seems to me to be a pretty sound bit of research, may I invite the Court's attention to Title 29 the Norris-LaGuardia Act, Section 113(c) because the Norris-LaGuardia Act says this, that under certain circumstances an injunction can be made and entered by the federal district court, [136] even in labor disputed, provided certain findings of fact are made, and then it says initially that the district court may not have jurisdiction to issue these restraining orders and preliminary injunctions in cases growing out of or involving labor disputes as defined in Sections 101 to 115; so, therefore, it would seem to me, may it please the Court, that the language of Section 113(c) of the Norris-LaGuardia Act, which is found on page 83 of Title 29, numbered 1 to 200 that there is the key, whether or not

your Honor has a right to proceed at this time to take testimony on the question of the preliminary injunction pendente lite. This statute says "the term labor dispute includes any controversy." Now we contend the matter before your Honor is a controversy. We contend it is an actual controversy, which is subject to be resolved under the declaratory statute, but these peculiar kind of controversies which limit the jurisdiction of your Honor concern the conditions of employment or concern the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. This is the particular question before your Honor —Query: Does, by reason of the interstate allegations of our complaint, bring our people within the terms and boundaries of the Taft-Hartley Act? Is it one of those disputes which concern the terms or conditions of employment? [137] It does not, because if the act applies, may it please the Court, Congress has prescribed the terms and conditions of employment in this industry. If it does not, under the facts, the commerce facts, as alleged and sought to be proven, if under those facts the Taft-Hartley bill does not apply, then the conditions of employment or the terms of employment will be determined by statute later or after negotiation and bargaining between the respective parties.

Does the controversy concern the association or representation of persons in negotiating, fixing,

maintaining, changing or seeking to arrange the terms or conditions of employment? We respectfully suggest, your Honor, it does not. If this Court finds, upon a hearing of the merits of this case, ultimately that the Taft-Hartley bill applies to the operation in all phases of this particular industry, by reason of it being engaged in interstate commerce as defined by Congress and federal statute and by Section 41(8), Title 28 then it simply means that any further controversy concerning terms or conditions of employment, concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, will proceed as provided by an application of the Taft-Hartley bill and when and if, upon the happening of those conditions prescribed in the Taft-Hartley bill certain controversies arise which require petitions to the National Labor [138] Relations Board, or other procedure or complaints, then, and then only, will the controversy resolve itself down into one concerning the terms or conditions of employment. Now if that be true, may it please the Court, we are simply asking your Honor this: we are asking you whether, by reason of the facts, resolving this thing into an interstate commerce operation, the Taft-Hartley bill applies. Now that is the only controversy—does a certain federal act apply?

The Court: Does a federal act apply to each of the multitude of labor unions?

Mr. Brown: No, your Honor, our query is, does it apply to this industry, which we allege in our

complaint has operated under a contract for at least one year, that is in the complaint, where all of them agree to the same conditions under that contract, except small modifications that may affect some particular craft. Traditionally, historically, and right on the 21st day when this complaint was filed, there was in effect a contract which was predicated upon the appliance of the old National Labor Relations Act. The employers recognized the various respective unions as the properly certified bargaining units and agents and representatives. They rest upon the agreement. Now these people hope to bargain for either an extension of this present Exhibit "A," a different one, or a refusal of it or a refusal under a modified proposition and they are simply stymied because some of [139] the folks in the Trades Council, which is the bargaining agent, as far as the master agreement is concerned, for virtually all of these unions, they say in their letter of May 18th, "Gentlemen, we feel that we can take the position that the Taft-Hartley Act does not apply." The employers come over here and they say, "Now, gentlemen, there is no controversy concerning terms or conditions of employment, but we feel that the Taft-Hartley Act does apply and if it does apply, we must, when we do sit down to the table to negotiate and bargain with you concerning any dispute, we have got to do it according to those rules." Now we contend this, if our people, as a collective group, constituting an industry, is found by this court to be engaged in interstate commerce, so as to fall under the provisions of the Taft-Hart-

ley bill, then I say the court has passed on the merits of the major issue before this court, but if the court simply assumes, from the allegations of this petition at the present time that the Norris-LaGuardia and Clayton Act applies, because we are in interstate commerce, then by the same token certainly the Taft-Hartley bill likewise applies.

We take this position—we take the position, first, that under 113(c), this does not constitute a labor dispute, hence there are no restrictions placed by the Norris-LaGuardia Act on the jurisdiction of this court; secondly, assuming that it is a labor dispute, still we have not only the burden, [140] but we have the right, to proceed at this time to present our testimony, so that your Honor can determine whether the court, from the evidence, is justified in finding the prerequisites under Section 107, for the issuance of a preliminary injunction from this date on under the Norris-LaGuardia Act, but more fundamentally and more essentially, your Honor, let us realize the position, outside of the motions which were filed and served. We are in a position where simply perhaps from the allegations of our petition, which contain some allegations of interstate commerce, we are assuming that your Honor must infer and conclude, as a fact and as proven on behalf of the respondents, first, that interstate commerce does exist in the operation of this industry, because if it did not, no federal act would be applicable, the Taft-Hartley Act, the Clayton Act nor the Norris-LaGuardia Act. Secondly, it is assuming that there is a labor dispute which the

court must find as a matter of fact from what? The argument of counsel. They have not presented any facts. They are assuming certain things what your Honor has got to find, and going back to this Lewis case, the court said in the Lewis case essentially this, that the court had a right to maintain the status quo until it had an opportunity to hear argument and receive the presentation of facts to determine even if there was a labor dispute within the definition of the Norris-LaGuardia Act. And we contend for those reasons, may it please the Court, that [141] that the court is in no better postion of being enlightened at this very moment than you were at the time the ex parte application was presented.

Upon those grounds and for those reasons we respectfully suggest that the Norris-LaGuardia Act does not perclude the court proceeding with the hearing of testimony.

In respect to this declaratory judgment, the Louisiana case which I suggested to your Honor this morning by the Supreme Court of the United States, is the Etna Life Insurance Company vs. Haworth, 300 U. S. Reports, and commences at page 227. Now this particular case, according to the article of the Bar Association, is the first case under the declaratory judgment act, Title 28, Section 400, of 1934 which really, by the decision of the Supreme Court, as to their uses, places any life or light into the declaratory judgment statute. Since that time the courts have held this, they have held this thing is purely a procedure remedy, as Mr.

Griswold suggested. It does not confer jurisdiction where jurisdiction does not exist. We do not have to show an irreparable injury, we do not have to show the absence of any other remedy, adequate or inadequate, in law or in equity, to invoke this particular business. Now counsel contends that that wasn't an actual controversy. He contends further that we are merely asking this court for an advisory opinion. Now we appreciate the fact that unless the controversy is actual, unless there [142] was advisory purpose and unless it was ripe for decision, then, of course, we have no right to ask this court, or any other court, for an advisory opinion.

In this particular case there had been a failure to pay premiums on life insurance and it involved the maintenance of reserves of some 20 thousand dollars. There was a provision in the life insurance policy which says when the policy holder became disabled that then further premiums would be waived. As long as the disabled policy holder would live, his rights with the Etna people would be preserved. Now under the insurance laws it became essential for the Etna Life Insurance Company to maintain reserves against those policies, although the company, in full faith, believed that the man's permanent disability was not actual and in accordance with the provisions of the policy. Now they had the choice, the Etna Life Insurance Company could have set up their reserves for a period of five, ten, twenty or thirty years, as long as Mr. Haworth would live, and then when he died they could deny liability, and then in addition to that, they would have faced a suit of the widow to determine whether

or not they were liable. They did not choose to do that. They said, "Here is an actual controversy. We are not asking for judgment, we are simply asking the federal court to determine, under the declaratory judgment act, whether or not there is any liability," so then, of course, that matter came up to [143] the Supreme Court and the opinion was written by Chief Justice Hughes and in the opinion the Court said: (Reads: "The complaint asked for a decree * * *".) Then he points out on page 240: (Reads: "The word 'actual' * * *".) Dropping down to the last paragraph: (Reads.)

As a matter of fact, one federal court has held just that very thing. That point was raised in the case of Adams vs. N. Y. C. & St. L. R. R. Co., Circuit Court of Appeals, Indiana, 1941, 121 Fed. (2), 808. There railroad employees could maintain an action for declaratory judgment defining their seniority rights, regardless of remedy available to the employees before the administrative tribunal, as provided by section 151, etc. The point, therefore, is this. We can not bargain. This thing is going to result in irreparable injury. There is no labor dispute, and unless this coiirt assumes jurisdiction and retains the status quo until he can define whether the federal act applies or not, then, of course, there will arise injury and the whole purpose of your declaratory judgment statute as a remedy will be defeated. Formerly, before 1934, the Supreme Court of the United States said neither in equity nor in law these courts can not give a judgment of any kind unless a wrong or

breach had occurred. The very fact that Congress provided a statute, a remedy, was to prevent the arising of a labor dispute over whether or not this book of rules applies, or this, and we are prepared, at [144] the Court's convenience and ruling to proceed with our factual burden.

The Court: I am ready at this time to rule on the question of the motion you made this morning, Mr. Brown.

At the beginning of the session this morning, Mr. Brown, on behalf of the petitioner, moved the Court for a preliminary injunction to preserve the status quo and that is a matter that we have discussed and considered throughout the day. Now, on the 21st of May the Court made its order to show cause and issued temporary restraining order. The order to show cause required that the respondents appear before the Court and show cause why preliminary injunction, to the same effect as the restraining order, should not be issued, on the 28th day of May, 1948, at 10:00 o'clock. At the time the application was made for the temporary restraining order, the Court's attention was called to the case of United Mine Workers of America, 330 U. S., 258 and in the course of its opinion the Supreme Court of the United States in that case stated:

> "In the case before us the district court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief."

In that case the defendants determined the law for themselves and did not heed the injunction of the district [145] court or the restraining order of the district court and violated it and they were held in contempt.

Now I feel that this is the same situation we have here. If this order that was made May 21st had been violated by any of the persons to whom it was directed, I wouldn't hesitate to act. I wouldn't hesitate to punish for contempt any person or persons or organization who violated that restraining order, under authority of the United States vs. United Mine Workers, on the theory that this court, and any other court, has a right to hold matters in status quo until the Court has opportunity to decide the questions involved, questions of law, and that was the purpose I had in issuing the preliminary order, temporary restraining order, in this case.

Now we have had an opportunity to hear from counsel on questions of law concerning the issuance of temporary restraining order or preliminary injunction. I can't understand how it could be said there is no labor dispute involved here. I think counsel has stated that the purpose of this is to prevent labor dispute from arising, or series of labor disputes from arising, so then we are, of course, interested, involved here, in consideration of labor disputes, not existing now, but contemplated in the future. Before the so-called Taft-Hartley law was enacted, and which is merely an amendment of the National Labor Relations law, the

[146] National Labor Relations law was in general the same kind and class of legislation as the Taft-Hartley law, and when complaints were made before the National Labor Relations Board, the employers complained of frequently questioned the jurisdiction of the National Labor Relations Board. Many cases are shown in the annotation to the different sections, having to do with the law before the enactment of the Taft-Hartley law, that the defendants or respondents, as they might have been called raised the question of the jurisdiction of the National Labor Relations Board, claiming that they were not involved in interstate commerce or their activities did not affect interstate commerce. One of those cases is the National Labor Relations Board vs. Van de Camp Packers in the Ninth Circuit, 152 Federal Reporter, Second Series. This is in the circuit court of the Ninth Circuit. The Board petitions for the enforcement of its order. The company contends first that the National Labor Relations act is not applicable, since it is not engaged in interstate commerce. It was decided there that that particular case was without merit.

Now suppose some controversy does arise here. What is there to prevent the petitioner from filing a complaint with the National Labor Relations Board, complaining about some alleged unfair labor practice of one of these unions, or of a group of these unions? Then the union or unions involved [147] could raise before the National Labor Relations Board the question of whether or not it was involved in interstate commerce, or whether its act-

ivities affected interstate commerce. Then the National Labor Relations Board could determine whether or not it had jurisdiction of the case and the party dissatisfied could take the matter to the Circuit Court of Appeals.

Cases of jurisdiction of the National Labor Relations Board have, I think, in the past always been cases first to the Board and then afterwards carried into the courts. I feel that whatever restrictions placed upon the courts by the Norris-LaGuardia bill still exist, unless we can find that they have been lifted by the present act, the Taft-Hartley Act, so we have to look to that Act to see what the power of this court is in regard to the issuance of restraining orders and the exercise of the injunctive power of the court.

This action is brought under the declaratory judgment statute. Now if the court couldn't, under the same set of facts as appeared in this complaint, issue an injunction in an action for damages, or an action for any other kind of relief, it couldn't issue an injunction in a declaratory judgment action. Petitioner may or may not be entitled to maintain an action to determine whether or not any or all of these labor organizations are subject to the Taft-Hartley Act. Whether such an action can be maintained is not [148] now before the court. The only question before the Court is whether or not this preliminary restraining order should be continued or whether a temporary restraining order or preliminary injunction should be issued pendente lite, and that is the only point I am attempting to decide.

Here is the holding of this court: That this court is without power to continue the present restraining order in effect and it is without power to issue, as prayed for, restraining order or preliminary injunction pendente lite, without prejudice at all to any other proceeding in this case, and that is the order of the court. [149]

State of Nevada, County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled, California Association of Employers vs. Building and Construction Trades Council of Reno, Nevada, etc., No. 700, at the hearing on Order to Show Cause, held at Carson City, Nevada, on the 28th day of May, 1948, and that the foregoing pages numbered 1 to 99 inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, June 2, 1948.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed June 2, 1948. [150]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendants above named, with the exception of Defendant Local Union of Operating Engineers, No. 3, all represented by their counsel, Morley Griswold and George L. Vargas, Esqs., and appearing especially for the purpose of this Motion to Dismiss, and move the Court as follows, to wit:

I.

To dismiss the complaint filed herein upon the grounds that the said complaint fails to state a cause of action upon which relief can be granted.

II.

To vacate and dismiss the complaint filed herein upon the ground that the Court lacked jurisdiction in that the complaint [151] fails to state a cause of action against said defendants, or any of them, upon which relief can be granted.

III.

To vacate, or in lieu thereof, quash the summons on the ground that the Court lacked jurisdiction.

IV.

To dismiss the complaint and quash the summons on the ground that the Court lacked jurisdiction of the subject matter of the action by reason of the Norris-LaGuardia Anti-Injunction Act, 47 Stats. 70, 29 U. S. C. A., Secs. 101-115.

V.

To quash the summons and dismiss the complaint upon the ground that the Court lacked jurisdiction to grant the relief sought by reason of the Norris-LaGuardia Anti-Injunction Act above stated.

VI.

To quash the summons and dismiss the complaint upon the ground that the Court lacks jurisdiction in that the subject matter is solely within the jurisdiction of the National Labor Relations Board, Labor Management Relations Act of 1947, 61 Stats. 136, 29 U.S.C.A. 141 et seq.

VII.

To vacate, or in lieu thereof, quash the summons and dismiss the complaint upon the ground that the relief prayed for is contrary to and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

VIII.

To vacate and dismiss the complaint filed herein upon the ground that it appears on the face of the complaint that the plaintiffs are not proper parties plaintiff in the said action and have no capacity to sue. [152]

IX.

To vacate and dismiss the complaint filed herein upon the ground that the defendants are not proper parties defendant in the said action.

X.

To quash the summons and dismiss the complaint upon the ground that the subject matter and relief prayed for are not within the provisions of the

Declaratory Relief Act, March 3, 1911, c. 231, Section 274 d. as added June 14, 1934, c. 512, 48 Stats. 955 as amended August 30, 1935, c. 829, section 405, 49 Stats. 1027, 28 U.S.C.A. 400.

/s/ MORLEY GRISWOLD,
/s/ GEORGE L. VARGAS,
Attorneys for above named Defendants.

Service of the foregoing Motion to Dismiss, by delivery of a copy thereof, is hereby admitted this 4th day of June, 1948.

BROWN & WELLS,
Attorneys for Plaintiff.

[Endorsed]: Filed June 7, 1948. [153]

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant, Operating Engineers Local Union No. 3 of the Internation Union of Operating Engineers, appearing specially, moves the Court as follows:

1. To vacate or in lieu thereof quash the summons and dismiss the Complaint upon the ground that the Court lacked jurisdiction in that the Complaint fails to state a claim against said defendant upon which relief can be granted.

2. To vacate or in lieu thereof to quash the Summons and dismiss the Complaint upon the ground

that the Court lacks jurisdiction in that the subject matter is solely within the jurisdiction of the National Labor Relations Board, Labor Management Relations Act of 1947, June 23, 1947, c. 120 61 Stats. 136, 29 U. S. C. A. 141 et seq. [154]

3. To vacate or in lieu thereof quash the Summons and dismiss the Complaint upon the ground that the relief prayed for is contrary to and in violation of the 5th and 14th Amendments to the Constitution of the United States.

4. To vacate or in lieu thereof quash the Summons and dismiss the Complaint upon the ground that the subject matter and relief prayed for is not within the provisions of the Declaratory Relief Act. March 3, 1911 c. 231, Section 274 d. as added June 14, 1934, c. 512, 48 Stats. 955 as amended August 30, 1935, c. 829, Section 405, 49 Stats. 1027, 28 U. S. C. A. 400.

5. To vacate or in lieu thereof quash the Summons and dismiss the Complaint on the ground that the Court lacked jurisdiction of the subject matter of the action by reason of the Norris-LaGuardia Anti-Injunction Act, Act of March 23, 1932, c. 90, 47 Stats. 70, 29 U. S. C. A., Secs. 101-115.

6. To vacate or in lieu thereof quash the Summons and dismiss the Complaint upon the ground that the Court lacked jurisdiction to grant the relief sought by reason of the Norris-LaGuardia

Anti-Injunction Act, Act of March 23, 1932, 192, c. 90, 47 Stats. 70, 29 U. S. C. A., Secs. 101-115.

Dated: May 31, 1948.

/s/ P. H. McCARTHY, JR.,
Attorney for Defendant, Operating Engineers Local No. 3 of the International Union of Operating Engineers.

Service of the foregoing Motion to Dismiss, by delivery of a copy thereof, is hereby admitted this 4th day of June, 1948.

BROWN & WELLS.

[Endorsed]: Filed June 7, 1948. [155]

[Title of District Court and Cause.]

MOTION OF THE NATIONAL LABOR RELATIONS BOARD AND LEAVE TO INTERVENE

Comes now the National Labor Relations Board and, under Rule 24 of the Rules of Civil Procedure for the District Courts of the United States, moves for leave to intervene in the above styled cause in order to protect its interest in the existing controversy.

1. The plaintiff herein relies for ground of relief upon certain provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C.A., Supp. 1947, Secs. 141, et seq.), which Act is administered by the National Labor Rela-

tions Board, an agency of the United States of America. The gravamen of plaintiff's complaint is that the collective bargaining agreement between plaintiff and defendants is subject to the provisions of the amended National Labor Relations Act, and that defendants are engaged in, or threaten to engage in, certain conduct which constitutes unfair labor practices under Section 8 (b) (2) and (3) of that Act. Plaintiff therefore requests that this Court should temporarily enjoin the commission of such alleged unfair labor practices, and should issue a declaratory judgment as to whether the contract between the parties is subject to the amended National Labor Relations Act. [156]

2. It is of vital importance to the National Labor Relations Board that its interest be adequately represented, and that the issues raised herein be properly determined. It is the Board's position that, under the amended National Labor Relations Act, the Board is vested with exclusive initial jurisdiction to determine whether the operations of employers and labor organizations affect commerce within the meaning of that Act, and that federal district courts are without jurisdiction to determine such questions at the suit of private parties. It is also the position of the Board that exclusive primary jurisdiction to determine whether unfair lafor practices within the meaning of the Act have been committed is vested in the Board, and that federal district courts are without jurisdiction, at the suit of private parties, to determine whether unfair labor practices have been committed and to remedy, by injunction or otherwise, unfair labor

practices. The jurisdiction of federal district courts over unfair labor practices has been expressly limited by Sections 10 (j) and 10 (l) of the amended National Labor Relations Act to those situations where the Board, or an officer or regional attorney thereof, petitions such courts for preliminary injunctive relief, pending a determination by the Board as to whether unfair labor practices have been committed.

Wherefore, the National Labor Relations Board respectfully prays that its motion to intervene be granted.

DAVID P. FINDLING,
Associate General Counsel;

A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations
Board.

Dated at Washington, D. C., this 30th day of June, 1948.

[Endorsed]: Filed July 2, 1948. [157]

[Title of District Court and Cause.]

MOTION

Comes Now the plaintiff and moves the Court for an order releasing, discharging and exonerating the cash bond heretofore deposited upon the issuance of Temporary Restraining Order in the above matter upon the following grounds:

I.

That said Temporary Restraining Order was dissolved by the above-entitled Court upon the hearing of the show cause order issued by this Court.

II.

That no damages upon which bond or undertaking was conditioned accrued to defendants or any of them.

BROWN & WELLS,
By /s/ ERNEST S. BROWN,
Attorneys for Plaintiff.

[Endorsed]: Filed July 6, 1948. [159]

[Title of District Court and Cause.]

ORDER

The motion of Petitioner to exonerate the bond in the sum of One Thousand Dollars ($1,000.00), heretofore deposited with the Clerk of the Court upon the issuance of the Temporary Restraining Order, coming on for hearing after due and regular notice, and good cause appearing therefor.

It Is Hereby Ordered, Adjudged and Decreed that said bond is hereby exonerated and the Clerk is hereby ordered to [160] return the said sum of One Thousand Dollars ($1,000.00) to counsel for Petitioner.

Dated: September 17, 1948.

/s/ ROGER T. FOLEY,
Judge.

Received from Amos B. Dicky, Clerk of the above-entitled Court, the sum of One Thousand Dollars ($1,000.00), as payment in full of the sums deposited with him as a bond in the above-entitled matter, and as directed and ordered by the above-entitled Court.

Dated: This 17th day of September, 1948.

BROWN & WELLS,
By /s/ ROBERT W. WELLS.

[Endorsed]: Filed Sept. 17, 1948. [161]

[Title of District Court and Cause.]

CONSENT TO INTERVENTION

Now comes the Respondents, Building and Construction Trades Council of Reno, Nevada, and Vicinity, et al., being the respondents represented by the undersigned, Morley Griswold and George L. Vargas, Esqs., and consent and agree that the Motion of the National Labor Relations Board for Leave to Intervene be granted, and the undersigned consent to such intervention.

Dated: July 6, 1948.

MORLEY GRISWOLD,
GEORGE L. VARGAS,
Attorneys for Building and Construction Trades Council of Reno, Nevada, and Vicinity, et al.

[Endorsed]: Filed July 8, 1948. [162]

[Title of District Court and Cause.]

CONSENT TO INTERVENTION

Now Comes the Petitioner, California Association of Employers, being the Petitioner represented by the undersigned, Brown and Wells, Esqs., and consent and agree that the Motion of the National Labor Relations Board for Leave to Intervene be granted, and the undersigned consent to such intervention.

Dated: July 13, 1948.

/s/ BROWN & WELLS,
Attorneys for Petitioner.

[Endorsed]: Filed July 16, 1948. [163]

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated that Operating Engineers Local No. 3 of the International Union of Operating Engineers having appeared specially herein to contest the jurisdiction of the Court do hereby consent to the intervention of the National Labor Relations Board.

Dated this 2nd day of August, 1948.

/s/ P. H. McCARTHY, JR.,
Attorney for Operating Engineers Local No. 3 of the International Union of Operating Engineers.

[Endorsed]: Filed Aug. 6, 1948. [164]

[Title of District Court and Cause.]

MOTION

Now Come the defendants above named, represented by [165] Morley Griswold and George L. Vargas, Esqs., and including all defendants save and except Operating Engineers Number 3, and appearing specially for the purpose of this motion to dismiss, and for no other purpose whatsoever, and do move the Court as follows:

I.

To dismiss the complaint filed herein upon the ground that the said action is now a moot question as shown by the affidavit attached hereto and made a part hereof.

II.

To vacate and dismiss the said complaint for the reason and upon the ground that no actual controversy exists between plaintiffs and defendant upon which the Court can give a declaratory judgment.

III.

To vacate and dismiss the said complaint for the reason and upon the ground that the complaint does not allege an actual controversy in compliance with Title 28, Section 400, U.S.C.A.

IV.

That defendants be permitted to present this motion at a time agreeable to Court and counsel.

Dated: September 2, 1948.

MORLEY GRISWOLD,
GEORGE L. VARGAS,
Attorneys for Respondents.

Service of the foregoing Motion, by delivery of a copy thereof, is hereby admitted this 4th day of September, 1948.

BROWN & WELLS,
Attorneys for Petitioner.

AFFIDAVIT

State of Nevada,
County of Washoe—ss.

Ernest M. Reynolds, being first duly sworn upon his oath, deposes and says:

That he is a citizen of the United States, that he is a resident of the County of Washoe, State of Nevada, that he is Secretary of the Building Trades Council of Reno in the City of Reno, State of Nevada, and that he has been such Secretary for more than two months; that as such Secretary he is familiar with any and all contracts and all of the operations, doings and proceedings of the respective Unions which comprise the said Building Trades Council; that at the date of the making of this [167] affidavit, that certain contract being Exhibit "A" attached to the complaint on file in the above-entitled action, has been and is of no

force and effect; that none of the said Unions, individually or as a group, are employed under or by virtue of the terms of said contract, and no members of any of said Unions are being paid or employed by reason and by virtue of said contract; that both employers and employees have cancelled said contract and that the said contract, by its own terms and by reason of notices given, has been cancelled or is terminated.

That new and different contracts have been entered into by each, every and all of the Unions in the above-entitled action and that the said new contracts are separate and distinct for each Union and said employers and employees are now operating under said new, separate and distinct contracts; that at the time of the making of this affidavit there is no labor dispute or trouble to your affiant's knowledge in the City of Reno between parties plaintiff and any of the parties defendant and covered by any of the provisions of the agreement Exhibit "A" attached to the complaint.

Dated: Reno, Nevada, September 3, 1948.

ERNEST M. REYNOLDS.

Subscribed and sworn to before me this 3rd day of September, 1948.

(Seal) MABEL ENGLISH,
Notary Public in and for the County of Washoe, State of Nevada.

My Commission Expires: January 21, 1952.

[Endorsed]: Filed Sept. 4, 1948. [168]

[Title of District Court and Cause.]

COPY OF MINUTE ORDER OF SEPTEMBER 16, 1948

* * * It Is Stipulated and Ordered that the Motion of National Labor Relations Board for leave to intervene be, and the same hereby is, granted. * * * [169]

[Title of District Court and Cause.]

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO DISMISS THE COMPLAINT.

The National Labor Relations Board moves this Honorable Court to dismiss plaintiff's Bill of Compliant herein, and as grounds therefor assigns the following reasons:

1. The gravamen of the Bill of Complaint is that the collective bargaining agreement between plaintiff and defendants is subject to the provisions of the National Labor Relations Act, as amended (61 Stat., 29 U.S.C.A., Supp. 1947, Secs. 141, et seq.), and that defendants are engaging in, or threaten to engage in, certain conduct which constitutes unfair labor practices under Section 8 (b) (2) and (3) of that Act. Plaintiff therefore requests that this Court should temporarily enjoin the commission of such alleged unfair labor practices, and should issue a declaratory judgment as to whether the contract between the parties is subject to the amended National Labor Relations Act.

2. This Court is without jurisdiction of the subject matter of the complaint because: [170]

(a) The amended National Labor Relations Act vests the National Labor Relations Board with exclusive initial jurisdiction of matters involving unfair labor practices.

(b) The federal district courts do not have jurisdiction, at the suit of private parties, to determine whether the operations of employers and labor organizations affect commerce within the meaning of the amended National Labor Relations Act, to determine whether unfair labor practices within the meaning of the Act have been committed, or to remedy, by injunction or otherwise, unfair labor practices. The jurisdiction of the federal district courts over unfair labor practices has been expressly limited by Sections 10 (j) and 10 (1) of the amended National Labor Relations Act to those situations where the Board, or an officer or regional attorney thereof, petitions such courts for preliminary injunctive relief, pending a determination by the Board as to whether unfair labor practices have been committed.

(c) Plaintiff has failed to exhaust its administrative remedy under the provisions of the amended National Labor Relations Act.

Respectfully submitted,

DAVID P. FINDLING,
Associate General Counsel;
A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations
Board.

Dated at Washington, D. C., this 30th day of June, 1948.

[Endorsed]: Filed Sept. 16, 1948. [171]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Hearing on Motion of National Labor Relations Board for Leave to Intervene and Motion to Dismiss.

Appearances: Brown & Wells, by Ernest S. Brown, Esq., Attorneys for Petitioner. Griswold & Vargas, By Morley Griswold, Esq., Attorneys for Building and Construction Trades Council of Reno. Louis S. Penfield, Esq., Appearing on behalf of joint counsel of National Labor Relations Board. P. H. McCarthy, Jr., Esq., Attorney for Operating Engineers Local No. 3 of International Union of Operating Engineers.

Be It Remembered, That the above-entitled matters came on for hearing regularly before the Court at Carson City, Nevada, on Thursday, the 16th of September, 1948. The following proceedings were had:

The Court: Case No. 700, the California Association of Employers vs. certain labor councils and unions, and there are several motions here and have counsel agreed on which one to consider first?

Mr. Griswold: We would bow to the wishes of the [175] Court. Two motions are determinative of the case. The very excellent brief that was filed by Mr. Penfield, who the Court will remember was in court last time representing the National Labor Relations Board, who was joined in it by Mr. McCarthy, who will be here in a moment, and joined in by my office. Then the other motion that was filed at a later date upon the ground that the case

is now moot and that was supported by an affidavit, with no counter-affidavit as yet having been filed, which I presume means that the statements in the affidavit are taken as correct, unless there is something here.

The Court: The clerk informs me there is a counter-affidavit.

Mr. Griswold: I said I had not been served with it. I have it now. Under the circumstances, with counsel from out of the State being here and perhaps their time being more crowded than mine, I am willing to step down for counsel, if they would desire to make their argument first, or I will argue the moot question and let them argue the other question, as they see fit. I believe the proper person to argue the question of jurisdiction would be the representative of the National Labor Relations Board because the government is interested and they are much more capable than any one else of presenting that question, so it is whatever your Honor and counsel decides, so far as my office is concerned.

The Court: It might be well before we launch into [176] any argument to have note made of the appearances.

Mr. Brown: For the record too, your Honor, there has been a motion to intervene, of course, on the part of the International Labor Relations Board, and we would like to have the record show that we stipulate that the Court may enter an order granting that motion to intervene, which will dispose of one of those matters at this time.

Mr. Griswold: I think we have all filed written consent to that matter.

The Court: So ordered then, the petition to intervene will be granted.

Mr. Penfield: Since the motion we filed went to the subject matter of the Court's jurisdiction over the subject matter, it might be well to consider that first. Since the motion to intervene was already granted, I will pass that up and go directly to our motion to dismiss. I think we have already filed this motion with this court, filed with a memorandum setting forth our reasons and authorities—motion of the National Labor Relations Board to dismiss the complaint.

The Court: I see; very well.

Mr. Brown: May I just make a suggestion that might save time, not by way of interruption. May it please the Court, if I may suggest to the court and counsel and for the purpose of expediting his motion, we, of course, now concede that insofar as any argument is concerned in regard to injunction and temporary restraining orders, that the way the record stands now, of course, we will have to concede that under the ruling of this Court and under further research that we have made, that any pleadings in the complaint relative to an unfair labor practice, which was the basic initially for our motion for declaratory injunction, is immaterial at this particular hearing. We concede all those arguments of counsel.

The Court: Let me ask you then, does it mean that all the allegations that are in the complaint

which may have to do with charges of unfair labor practices are now out of the case?

Mr. Brown: They are now out of the case and the only thing that we feel is material, in view of the Court's ruling and our own concessions, is whether or not there is a controversy here which is sufficient, under the requirements of Section 400, Title 28, to enable this Court to consider whether or not, under the declaratory judgment remedial provision, the Court has jurisdiction. Our complaint and our prayer limit only to asking for declaratory judgment on whether the Taft-Hartley act applies, or whether the matter is purely a State matter.

The Court: May I see if I clearly understand the situation as you have presented it. Your point is that the matter before the Court is to determine whether or not a declaratory judgment should be granted to the effect [178] that the labor unions named in the complaint as defendants are within the purview of the Taft-Hartley law?

Mr. Brown: Yes, your Honor.

The Court: And further that all allegations in the complaint which may tend to allege unfair labor practices on the part of all or any of the labor unions are out of consideration now?

Mr. Brown: Yes, your Honor. In other words, we take the position at this time that those allegations regarding irreparable injury, things which might happen and which were previously suggested to be unfair labor practices appearing in our complaint, were put in there for the purpose that our complaint was used as the basis for the prayer

for restraining order, temporary injunction, and what have you. We now consider that that matter is behind us.

Mr. Griswold: Under the record as it now stands, I now at this time move the Court for dismissal of this action upon the ground that counsel's statement has divested this Court of any jurisdiction that it may have had and that the Court has no jurisdiction at this time to hear any of this matter, for the reason and upon the ground that the Taft-Hartley Act and the law as it now stands puts within the administrative jurisdiction of the National Labor Relations Board the determination of the question that is now presented by counsel to this Court, and I won't argue that motion because [179] I think we have covered it.

The Court: In addition to the statement you have just made, would you be kind enough to summarize what you consider your view of the contentions of the complaint, on what they are based?

Mr. Griswold: Now he is coming in asking only that this Court determine this question: Are the unions and the employers under the Taft-Hartley Act or are they not? No question of damages, no question of restraining orders, no questions are presented save and except that one question, that they are asking your Honor to pass upon—are they under the Taft-Hartley Act or are they not. Now the act, in my opinion, and that was the purport of my motion, the act is so clear that the National Labor Relations Board—and the cases are so clear upon that point—as an administrative body determines that question and they have the sole juris-

diction of determining that question and no appeal can be taken or no court action can be had until an appeal is taken from the action of the National Labor Relations Board and they have claimed to have done something wrong. I think in a nutshell I have stated the position.

The Court: A ruling on your motion will be deferred for the time being.

Mr. Griswold: I expected that and wanted the record clear and I would like Mr. Penfield, who is very familiar with [180] that law to argue it.

Mr. Penfield: If I understand Mr. Brown's position at the present time, he is conceding that insofar as the allegations of his complaint might seek to have this Court decide——

The Court: Not to interrupt you, and after I get settled, I will not any more—how would it be now to ask Mr. Brown to state what he considers the basis of the controversy. In order to invoke the declaratory injunction law, there must be an actual substantial controversy. Let us get Mr. Brown's statement what the controversy is, so we will know what the contention is. You don't object?

Mr. Penfield: No.

Mr. Brown: May it please the Court, our position is this, that we contend, from the statement of the allegations in the complaint, that at the time of the filing of the complaint, on or about the 21st of May of this year, there were pending negotiations between the respondent unions and the petitioners in respect to the renewal of the collective bargaining contract. That is alleged in the complaint. Then it is further alleged in the complaint that at

that time and place two additional major demands were made in the negotiations by the unions. The first one, of course, was for a closed shop or other form of union security. The other one concerned wages and hours. Then it is alleged that during that negotiation the employers took the position that there [181] could be no negotiations or contracts relative to union security because the negotiations were governed by the federal Taft-Hartley Act. The complaint further shows, in the correspondence which is attached as exhibits, that at that time and place it was the contention of respondent unions that the Taft-Hartley or federal act did not govern the particular situation alleged in the complaint. Now we contend—of course, Governor Griswold has filed a motion that the matter has become moot and we assume that matter will be taken up after Mr. Penfield's discussion on this thing—but we contend the controversy is an actual substantial one, it is ripe for decision, it involves adverse interests at this particular time, and it consists succinctly of this, that here are your unions that have endeavored to have their rights determined in relation to their dealings with their employers, they contend that the Taft-Hartley does not apply to the formation of any contract between themselves and the employers. The employers, on the other hand, contend that the Taft-Hartley act does apply and governs their negotiations, and in view of that situation we are now limiting our prayer to merely seeking a declaratory judgment of this court that we are engaged in interstate commerce or the circumstances, as alleged in the

complaint, so affects interstate commerce as to be governed by the Taft-Hartley act. The other people, on the other hand, naturally, if the Court entertains jurisdiction to hear the matter on its [182] merits, might declare that the Taft-Hartley Act——

The Court (interrupting): Let me ask you right there, Mr. Brown—at the present time are there any negotiations pending?

Mr. Brown: There are, your Honor.

Mr. Penfield: Which ones?

Mr. Brown: The Electrical Workers have not signed an agreement. The Roofers, at this particular time, who are respondents, have a definite stipulation with employers which refers to this controversy and is merely a stipulation relative to wages and hours and it quotes in the contract the fact that until such time as this matter is determined by your Honor, the other conditions, such as union security, etc., will remain in abeyance, until such time as the Court makes its ruling.

Mr. Griswold: I would suggest, if the Court please, that that document be put before the Court. I did not get that interpretation.

The Court: Mr. Brown says negotiations are pending between the Electrical Workers.

Mr. Brown: There is now pending negotiations between Electrical Workers, respondents, and employers. There is merely a stipulation as to wages and hours and any other working conditions between employers and carpenters Local Union 971, carpenters and joiners, and for the sake of the record at [183] this time I should like to offer in evidence the stipulation between Reno Employers

Council and Roofers and Waterproofers Local, dated July 21, 1948.

Mr. McCarthy: Pardon me, gentlemen, before offers of proof are made, I think we should enter our appearance also. P. H. McCarthy, Jr., Local Union 3, special and associated jointly with Mr. Griswold. We did originally, if the Court please, move to vacate, quash and dismiss the proceedings, upon the ground that jurisdiction of the subject matter is solely within the National Labor Relations Board. What troubles me is this—counsel has stated that certain parts of his complaint are no longer applicable. I think in fairness to the Court and counsel we should be given the exact language of this complaint which that statement impliedly strikes, because it is pretty difficult to argue a complaint on the statement that certain allegations are no longer before the Court and counsel concedes they are no longer before the Court. I think we should know exactly what those allegations are, so we would know what complaint we are to argue on.

The Court: I think from Mr. Brown's indications, he is willing to do that.

Mr. Brown: Yes, your Honor.

The Court: And then we can follow along and see——

Mr. Brown: Do you want me to finish that question you asked, what the controversies are now? [184]

The Court: Yes, and then we can proceed.

Mr. Brown: Your Honor, we have filed an affidavit which contents can be summarized briefly as this, that since filing of this action there are

stipulations pertaining only to temporary matters concerning collective bargaining contract, to-wit: wages and hours. The first one that I wish to bring to the Court's attention is with the Roofers and Damp Waterproofers Workers Union Local 224, dated July 21, 1948. It is signed—this copy apparently has been signed by the union people and by the employers: "This will serve——

The Court: Let me ask you—we are relying upon this complaint, upon the cause of action, and any stipulations or conditions that arose July 21st would be two months after?

Mr. Griswold: That is right.

Mr. Brown: If the Court takes that position, we are out, because we assume, for the purpose of this motion, that the allegations of the complaint governs.

The Court: Aren't we bound, as a matter of rules of pleading, to all that is in the complaint and nothing that transpired afterward?

Mr. Brown: That is correct.

Mr. Griswold: Except on the moot question.

The Court: I mean as far as the controversy is concerned. Material things must have to do with matters in [185] existence at the time of the filing of the complaint.

Mr. Griswold: May I call your Honor's attention to one thing in the complaint?

The Court: Mr. Brown has indicated he is willing to review this complaint here before us all

and consent certain matters be considered stricken, as far as this present hearing is concerned. Do you want him to do that, Mr. McCarthy?

Mr. McCarthy: I think so, so we know what we are arguing about.

Mr. Brown: Now for the purpose of the record, taking the complaint, paragraph I, of course, pertains to the status of the employers association. That will remain in as is. Paragraph II: "That on the 24th day of May, 1947, the petitioner and the Building and Construction Trade Council of Reno, Nevada * * *" etc. That entire paragraph will remain in.

"That thereafter * * *", the following paragraph of paragraph II—"That thereafter and after the execution of the master agreement aforesaid the following respondent union, to-wit: * * *" naming them—"* * * did each append thereto as a part of Exhibit 'A' a stipulation wherein each of said respondent unions adopted the conditions of the said master agreement." We want that to remain in for the purpose of this argument.

Paragraph III: "That this action * * *" [186] etc., we desire that to remain in.

Now we want paragraph IV to remain in, "That prior to entering into the master agreement under date of May 24, 1947, appended hereto as Exhibit 'A,' the said Reno Employers Council did act for and on behalf of the following members: * * *" naming the individuals. Paragraph IV to remain in in its entirety.

Now we desire that all of paragraph V remain in.

Paragraph VI remain in.

Now in regard to paragraph VII, we would consent that some matters therein contained by considered parenthetically. "That your petitioner is informed and believes and therefore alleges the fact to be that respondents will not negotiate or bargain upon any other assumption than that they are not covered by the provisions of the Labor Management Relations Act of 1947 * * *," we desire that to be in, "* * * and that they have determined that they will not comply with the provisions of Section 8 A 3 of said Act; * * *" A period after Section 8A3, line 16, paragraph VII.

The Court: Strike from the words "Said Act"?

Mr. Brown: No, strike the following: "that your petitioner is informed and believes and therefore alleges the fact to be that the position of respondents whereby they have contended throughout their negotiations that they are not covered by said Labor Management Relations Act of 1947 is not in [187] good faith, but is a subterfuge for the purpose of coercing the petitioner into complying with the original demands for an amendment to said agreement under the master agreement, particularly in regard to wages * * *" etc. We do not desire to strike that from the complaint, but we desire to contend that it is immaterial at this time, because we have withdrawn our prayer for injunctive relief. It is merely in there——

The Court: The only part of paragraph VII that is material is that part that ends on line 16?

Mr. Brown: That is right, your Honor, and the rest, which would naturally allege an unfair labor practice, was inserted for the purpose of giving the Court information at the time of our original hearing.

We desire to leave number VIII in, the next paragraph, and number IX, of course, is in. Number X is in.

Now in the prayer—of course, the Court has already ruled on that matter and we will stipulate the Court may disregard paragraph 3 of the prayer, the temporary restraining order; also paragraph 4, "That in the event this Court finds that the Labor Management Relations Act of 1947 controls and governs the collective bargaining of the parties hereto that this Court order that any agreement arrived at by the parties hereto thereafter in respect to wages shall date from the date such agreement shall be entered into and shall in no event become retroactive from that date of May 21st, 1948." We withdraw [188] that portion of the prayer; and of course 5 is immaterial at this time and we will withdraw that, and we will leave No. 6 in. All we are asking for is declaratory judgment.

Mr. McCarthy: Now may it please the Court, unless I misunderstood counsel, counsel stated (Quote) "All allegations which may tend to allege unfair labor practices are now out," and it was because of that statement that I asked that he specify what portions are out. I would like to direct your Honor's attention to paragraph VI of this complaint, which directly alleges an unfair labor prac-

tice, and ask your Honor to find that it is an unfair labor practice. They say:

> "That the continuation of said condition aforesaid referred to as the 'union security clause' or 'closed shop' provision of the master contract would be in direct violation of Section 7 of the Labor Management Relations Act of 1947, the same being a Federal Statute."

which is a direct charge of an unfair labor practice and as such, if counsel's original statement is correct, should properly be stricken from this complaint, or his position is different than as he stated it generally to the Court and he is still asking this Court to determine unfair labor practice charges.

Mr. Brown: Your Honor, may I make this observation: Maybe I am not qualified—in other words, we put this complaint [189] in and I am not going to strike out anything by consent that might jeopardize our position in this respect. Our burden eventually in this picture is going to demonstrate to your Honor that we have an actual, right, concrete, adverse controversy which gives the Court an opportunity, if it has jurisdiction, to afford a remedy. We are not asking the Court to determine an unfair labor practice. We are merely putting in that allegation VI in relation to these other allegations, to show an actual dispute between these parties.

Mr. McCarthy: Requires finding of fact by this Court which I believe Mr. Penfield for the government will demonstrate your Honor can't make.

Mr. Penfield: If I understand what Mr. Brown

has set forth, he is alleging now—if I understood the complaint as this originally was—he was asking this Court to determine (1) that the particular businesses and individuals involved were under the jurisdiction of the National Labor Relations Board and also was asking this Court to find that certain conduct which they had already engaged in or announced their intention to engage in, constituted a violation of that act.

The Court: I want to be sure that you stated what you intended to state. Maybe I misunderstood you. Mr. Brown's contention that you are considering right now, as I understand, is to determine whether these labor unions are under the Taft-Hartley Act, not the National Labor [190] Relations Board.

Mr. Penfield: That is what I meant to say. In other words, they are covered by its provisions, and as I understand it now—and I would like Mr. Brown to state if this is correct—now you are not seeking to have the Court adjudicate whether or not the conduct which has transpired, or is threatened to take place, constitutes a violation of the Taft-Hartley Act, but is to have this Court decide whether or not the Taft-Hartley Act can cover the particular individuals and types of businesses they are engaged in, is that correct?

Mr. Brown: May it please the Court and Mr. Penfield, that is absolutely correct. Our theory is this—the only issue of fact eventually that is going to develop is whether or not the operation of the industry, the operation of the unions and employers is in interstate commerce or so affects inter-

state commerce as to be governed by the Taft-Hartley Act. We are not asking the Court to adjudicate anything in respect to past acts, not asking the Court to declare unfair labor practices, and my answer to your last question is that our contention is limited to that very thing.

Mr. Penfield: I might say in that regard I do not think it fundamentally affects the position we take. Perhaps it narrows the thing down slightly more in respect to the relief asked. However, in discussing and arguing the matter, it will be necessary to consider, I think, both aspects of it [191] because both go to the same thing, the jurisdiction of a district court to decide on matters free of the coverage of the act with respect to its application to particular individuals or with respect to a particular violation, whether such violation with respect to these individuals or businesses is governed, and I do not think they can be entirely separated for the purposes of argument, although I will try to limit it as best I can.

Mr. Griswold: Before you start on your argument, Mr. Penfield, may I interrupt again for something I would like to ask. The Court will recall—it has come up now and your Honor asked what the actual controversy was. The Court said very properly that we were bound by the pleadings in the complaint. I want to call your Honor's attention to two or three statements that were made in the complaint, insofar as actual controversy is concerned. I refer now over to page 6, as I have it here, of the complaint, which is paragraph V, in

which this statement is made—I am reading from line 18:

> "That it was the opinion of the Reno Employers Council after advice given by legal counsel, that the Labor Management Relations Act of 1947 prevented the continuation of the master agreement beyond May 21, 1948, without a revision of the union security provision of said contract as required by said Labor Management Relations Act of 1947." [192]

In other words, the complaint says that the contract upon which this action is founded went out, unless your Honor stopped it, on May 21, 1948. Now the contract is the basis of the complaint and their allegation is when you did not continue that restraining order in effect, that the original contract was discontinued.

Now go over a little farther, and this is on the top of the next page, in the same paragraph:

> "That thereafter and during said negotiations your petitioner took the position in such negotiations that the master agreement could not be continued after the date, May 21, 1948, without compliance with Section 8 A I of the Labor Management Relations Act of 1947, the same being Chapter 120, Public Law 101, which requires an election and affirmative vote of the employees on the question whether union membership be made a condition of employment."

Now let us tie that in, if the Court please, with the next statement that is found over in the com-

plaint. I am referring now to page 12 and paragraph X, in which this statement is made, and then I want the two contracts that counsel was going to hand your Honor read to your Honor, so your Honor can get the full picture:

> "That your petitioner does not contest or [193] object to the fact that respondents are the proper, recognized bargaining agents for the employees in the aforesaid industry for the purpose of negotiating and bargaining for hours, wages and working conditions, but that said petitioner does contend that respondents have not complied with the Labor Management Relations Act of 1947 in respect to having had the proper elections authorizing said bargaining agents of respondents herein to negotiate and contract for a union security clause in any collective bargaining contract arrived at after negotiation with petitioner; * * *"

Now the complaint itself, may it please the Court, states that the contract which is the basis of the complaint was discontinued on May 21st and would be discontinued unless your Honor had restrained it, and then the complaint says that these people, the unions, are the proper parties to bargain on wages and hours. Now if the Court please, if you have those now, I would like to hand to your Honor the contracts that were entered into, which are merely doing exactly what was said could be done in the complaint. Now insofar as actual controversy, going to the four corners of the complaint——

The Court (interrupting): First maybe we are going a little too far in advance. It seems to me that [194] normal presentation of this argument—this is just a suggestion—first, has the Court jurisdiction. We are not concerned with the question whether or not there is a controversy until we find whether or not we have jurisdiction to act if there was one.

Mr. Griswold: I agree with that, but your Honor asked the question as to actual controversy and I put this in because I was not satisfied with Mr. Brown's statement of the actual controversy. I didn't agree with him on it.

(On Motion to Dismiss.)

Mr. Penfield: Your Honor's observation is precisely as I was about to mention. We are not admitting there is a controversy or not. Assuming there is a controversy, for the purposes of argument, we maintain the Court does not have jurisdiction over the subject matter. Our motion raises three principal points: (1) that the Act does confer exclusive jurisdiction in the Board in all matters involving unfair labor practices, and (2) the Court does not have jurisdiction of the suit of private parties, that federal courts do not have jurisdiction in the suit of private parties to determine whether the operations of employers and labor organizations affect commerce within the mention of the Act. In other words, such jurisdiction is given by Congress to the Board initially and that jurisdiction which district courts do have in certain [195] labor matters covered by the Act is

strictly limited by certain sections of the Act, to which I will refer later, and to point out to the Court that this is not one of them; and (3) the plaintiff has failed to exhaust its administrative remedy under the provisions of the Act and therefore states no cause of action.

Now as I indicated before, I can not entirely separate these contentions and I think that actually they are one and the same thing. The Court's attention has already been called to certain allegations of the complaint. Certainly the complaint does allege, on pages 3 and 4 of the complaint, paragraph III, that the action arose under the commerce clause of the Constitution and under the Labor Management Relations Act of 1947. Now following this general allegation of the basis for jurisdiction, the complaint goes on to say that the plaintiff has members and to set forth the nature of each industry, how it has certain materials move across State lines, that there had been a contract in effect up until through May of 1948 and thereafter that defendant had notified plaintiff that it desired to negotiate, that a dispute had arisen concerning the applicability of the Labor Management Relations Act, referred to by its more common title, Taft-Hartley Act, but has taken the position that the provisions of the Act do not govern, and inasmuch as prior contracts did require closed shop, or what they call union referral clause, which were now outlawed [196] by the Taft-Hartley Act, the only way the union security clause could be obtained was for these defendants to go to the Board and participate in the type of election required by

Section 907, that in order to coerce plaintiff to agree to an increase in wage levels presently contained in the contract, defendant has taken the position that the Taft-Hartley Act did not apply and it was their position that they were not bargaining in good faith and they were asking this Court initially, at least, to enter a judgment to give them declaratory relief, deciding whether or not these operations did affect commerce within the meaning of the Act, and as I understand the original complaint, original prayer, they were also asking this Court to decide whether or not these provisions that the union was demanding were in themselves violation of the act. Now I understand that portion has been dropped, but they still want the court to decide that the type of business involved affects commerce to such an extent that the provisions of the act govern.

Now it is our position that we have exclusive jurisdiction to determine these questions initially and that there is no authority vested in this court at a suit of private parties to determine whether or not the Taft-Hartley Act provisions do govern. This goes to the question of whether or not this court can decide that this particular business affects commerce, at least for the purpose bringing it within the purview [197] of the Taft-Hartley Act, or whether or not they have engaged in unfair labor practices. Our position is they go back to the Wagner Act itself. The Wagner Act, when originally enacted in 1935 stated specifically in Section 10 (a) that the Board had exclusive jurisdiction over all matters involving unfair labor practices.

The exclusiveness of the Board's jurisdiction is not only borne out by the language of the Act, in which the word "exclusive" was used, but also borne out by the legislative history, which indicated an intent on the part of Congress to set up an administrative tribunal which in certain matters where labor relations affected commerce, that this administrative tribunal would be the first forum to which the parties could go. Provisions were made in the Act that if persons were aggrieved by the activities of this administrative tribunal, they could then go to the proper circuit court of appeals for a review. That was the parent of the Act. It was attacked repeatedly. Attempts were made in the early days of the Act to bring the matter before district courts by various types of proceedings. Many decisions were handed down. The matter was adjudicated by the Supreme Court. We have cited in our memorandum—I won't burden the Court with going into them now—at any rate, it is established without any question of——

The Court: What the Court is concerned with—I am anxious to be burdened with these authorities.

Mr. Penfield: We have submitted a rather extensive [198] memorandum in support of our position and on page 7 of the memorandum, pages 7 and 8, we have cited cases, Supreme Court cases and Circuit Court cases. These cases, bear in mind, of course, were decided after the Wagner Act—I refer your Honor to that at present as authority for the proposition that the Wagner Act conferred public rights that were enforceable by the Board

and the Board had exclusive initial jurisdiction. I think most of these cases make that matter very clear, and as we point out in our foot-note in our memorandum, the original Wagner Act, which was amended, did have a bill granting concurrent jurisdiction to the Board and district court to prevent unfair labor practices, and this was deleted by the committee in conference with the Senate and did not go into the bill. I do not know as counsel seriously challenged under the Wagner Act the Board's exclusive jurisdiction in matters like these. It was clear and supported by competent court authority, including the United States Supreme Court, in these cases we have cited. So the question then arises, did the enactment of the Taft-Hartley Act, slightly more than a year ago, change the situation, so that now this court would be given jurisdiction which it would not have had under the Wagner Act? We submit that no such change has come about; first, because of the language of the new act itself; second, because the legislative history in connection with the language, insofar as it might be construed, is in no way ambiguous and fully supports the construction [199] that we give to the language; and, third, because the courts before which the cases have come since the enactment of the Act have found—and we think with well-reasoned opinions in a number of them, with particular respect to the Amazon Cotton case in the 4th Circuit, to which I will refer later, that we feel support our position.

Mr. Brown: Your Honor, I might suggest to counsel and the Court that under the Amazon Cotton Case we are absolutely agreed that this court

had no jurisdiction—we will so stipulate—to prevent an unfair labor practice as it is provided for in the Wagner Act concerning an unfair labor practice. We admit that you have to go to your administrative remedies, you would have to exhaust them, and we would like to recommend that the only issue is this, does this court have jurisdiction, under declaratory judgment act, to say whether the Taft-Hartley Act applies or not. Counsel in his argument is absolutely correct on the law in respect to those other matters. Mr. Penfield, we will so stipulate.

The Court: Let me ask you this, Mr. Brown. You agree with Mr. Penfield that under the Wagner Act the district court had no jurisdiction to determine, that the matter was a matter for the administrative board of the National Labor Relations Board?

Mr. Brown: No, that isn't it at all, your Honor. We will admit that the Supreme Court of the United States, in [200] Bethlehem Steel vs. New York Labor Relations Board, held this view, that insofar as Section 10 (a) of the old Wagner Act, which is Section 10 (a) as amended of the new Taft-Hartley Act, that insofar as power of the Board to prevent unfair labor practices, that the Board and not the courts had exclusive jurisdiction. Now that is not the proposition here at all, may it please the court. We are not asking this Court to prevent an unfair labor practice. We are not suing for damages. We are merely asking whether, by virtue of being under interstate commerce, or affecting inter-

state commerce, are we under the fair labor standards.

The Court: Has the National Labor Relations Board the power to pass upon questions of its own jurisdiction?

Mr. Penfield: That is the initial problem in every case before us, whether the particular person and type of business engaged in affects commerce within the meaning of our Act.

The Court: In other words, the second contention that you make is that the plaintiffs here—that is what they are denominated—do have administrative remedy at the present time of applying to your Board for a determination whether or not the operation of these different unions, or any one of them, are within the Taft-Hartley Act?

Mr. Penfield: Precisely.

Mr. Brown: May I just point out one thing. I want [201] to get the record straight, may it please the Court. We have Exhibit "E" to our complaint, which consists of Mr. Penfield's boss's letter to our clients, and it reads as follows:

"National Labor Relations Board
Washington, D. C.

April 8, 1948

"Reno Employers Council
Attention Mr. W. M. Caldwell
P. O. Box 2390
Reno, Nevada
Gentlemen:

"This will acknowledge your letter of March 26, 1948, in which you make inquiry with respect to

the proceedings required for the renewal of the agreement between the Reno Employers Council and the Building and Construction Trades Council of Reno.

"The problem which you pose is a controversial one which doubtlessly will at some time be the subject of Board and Court decisions, and is one to which I do not feel justified in giving a solution without very thorough and careful study. I regret, therefore, that I find it necessary to decline to advise you on this matter. I am sure that you will understand the reason when you consider how many such requests have been directed to me in these busy times. I sincerely hope that these problems will soon become settled and that your legal advisers can now give you the assistance which you need.

"Returned herewith is the copy of the agreement which you designated as Exhibit 1, in your March 26th letter.

"Sincerely yours,

/s/ ROBERT N. DENHAM,
General Counsel." [202]

Mr. Penfield: Well, precisely, your Honor. We have every day in our regional office, and I assume it exists all over the country and in Washington, people coming in and asking what about this, does your Act cover it, and that sort of thing. We are operating, the Board, as a quasi-judicial agency. They are asking us to decide matters. We could not give anybody a binding opinion. It is a controver-

sial question but who is to decide it? The Board. Not this Court, and that is the question.

The Court: Let me make an observation here to see whether I have the right understanding of Mr. Denham's letter. It says, the problems will doubtlessly be the subject of Board and Court decisions. Now wouldn't that mean that the Board might decide this present question? Then if the parties who felt aggrieved desire to take it into Court, they would go into the Circuit Court of Appeals?

Mr. Penfield: Precisely, that is exactly what would happen, and there are instances where the matter might come before the district court, if the Board brought it on a——

The Court: (Interrupting) Now there is one principle of law that seems to me to be pretty persuasive and applicable to such a situation as this, that a person who feels aggrieved and has either administrative remedy or a court remedy, must pursue their administrative remedy [203] first. Now if it is conceded here by the plaintiff that the only questions which are raised here now before this Court could be determined by the National Labor Relations Board, I think we ought to be through with this. If these very questions here that are presented to the Court today, if the National Labor Relations Board, an administrative body, has the power and authority to determine whether or not the Taft-Hartley Act applies to this group of unions, or any one of them, it seems to me that the plaintiffs here should first exhaust their administrative remedy.

Mr. Griswold: That is right.

The Court: If it is conceded by Mr. Brown that the National Labor Relations Board has the authority and power, if an application was made to it, to determine first the question——

Mr. Brown (Interrupting): No, I have not made that contention, your Honor.

The Court: You dispute that, Mr. Brown?

Mr. Brown: Yes, we dispute that.

The Court: Well, it appears to the Court that the National Labor Relations Board has the power to determine whether or not these unions, or any one of them, are subject to the Taft-Hartley law, on the ground there is an administrative remedy which has not been exhausted.

Mr. Penfield: In that connection, I think it perfectly [204] clear that we do have the power. If you look at the allegations of the complaint, they set forth that this difference arose over the application of the Act. Now if you look to the provisions of the Act, the Board does not have what you might call automatic jurisdiction of everything that may be within its purview. It is necessary for a party to file with us documents known either as a charge alleging that somebody is engaged in unfair labor practices, or a petition alleging that their exists a question concerning representation which it asks us to determine. Now we have had this matter up. We have a case on trial in Oregon at the very moment, where the issue was raised by the union insisting upon provisions in its contract which it claimed did not violate the provisions of Section

8 A 3 of the Act, with respect to the closed shop, a union provision which that proposes to outlaw. The union took that position and claimed that the Act did not cover that. The employer said it did cover it. The union said, "We insist on bargaining with you and as a condition that you agree with this provision you have always had in your contract for many years and we feel we have the right to do it." They did not follow the law. The employer came to us and filed charges, alleging the union was refusing to act in good faith for the reason that the union was insisting upon this under the act and had no right to insist upon it. Now we issue a complaint upon that basis—there is more than one case, I am referring [205] only to one with which I am familiar, but that is exactly the way an issue like that can be decided. One party is wrong, that is true of every lawsuit, and we then have before us the question of whether or not—clearly, if the union's position is that its business does not affect interstate commerce, we have no jurisdiction in matters which do not affect commerce within the meaning of our act. It is very controversial. Some cases are clear, some are borderline, there are some cases in which you have court decisions, some cases none. We proceeded in that case now that went to Mr. Denham. They told him about this dispute, asked his opinion, he said he couldn't give an opinion, that is a matter that might come before the Board and the Board would have had to decide. He could not give an opinion any more than your Honor could if somebody asked

you whether any conduct violated the law. You might discuss the matter, but couldn't give an opinion, but courts do not determine that sort of thing and boards and quasi-judicial agencies do not. This matter can be raised in the same way. The employer could have taken the position that there was coverage, the union was taking the position there was no coverage. One or the other is true. If a charge was filed with us, we could determine, but we still can determine if it still is a matter of issue, and that is precisely our point here.

The Court: Did Mr. Brown contend that the National [206] Labor Relations Board has not power and authority to determine whether or not these particular unions are within the purview of the Labor Management Act and Taft-Hartley law?

Mr. Brown: No, I do not contend that point, your Honor, if I may respectfully suggest—the Board only has such power as is conferred by this law, Section 10 (a), and the following sections there. The Board is empowered as hereinbefore provided, "to prevent any person from engaging in any unfair labor practice affecting commerce." This power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." Now I think the theory that perhaps the Court has in mind and Mr. Penfield and some of us is that we are seeking, by way of remedy, a declaratory judgment of some affirmative relief. We have no unfair labor practices at all, your Honor. We are merely asking whether this book applies or the other one does.

The Court: Let me ask a question there. Suppose this Court did determine in this action that the Act applied, what would you do next?

Mr. Brown: That would become res adjudicata.

The Court: What is your next step?

Mr. Brown: The next step, your Honor, is to negotiate and bargain with these respondents and complete a contract [207] covering all the conditions. That is our plan.

Mr. Penfield: I can see the next step very easily, your Honor. If the Court made an adjudication to that effect that the Act did cover, they would then say, "You have to go to the Board and go through proper allegations." We are charged under the law with determining these matters. Maybe we differ. It was for this very reason that the Board has exclusive jurisdiction. An attempt was made to synchronize it so we wouldn't have the courts all over the country coming to one conclusion and the Board coming to another conclusion, with attendant abuses.

Mr. Brown: If Mr. Penfield can point to any authority in law, case or statute, which says that the Labor Relations Board has the authority to determine upon the question, is this industry covered by the Act or is it not, I would like to hear it. We contend, your Honor, that before that matter is a matter to be determined by the National Labor Relations Board, there must be a charge filed with the National Labor Relations Board, of which the question of jurisdiction is but one element to be determined, but that this court is not asked to prevent an unfair labor practice. There is not a single

iota of language in the Taft-Hartley Act or the Wagner Act, nor any other decision of this court that way, but we have a brand new decision in the State of New Hampshire under the declaratory [208] judgment act, not a federal case, but the Supreme Court of New Hampshire said it was proper, under declaratory judgment for the court, under union declaratory act, which is essentially your federal act, to determine whether or not the Taft-Hartley governed or the Willey Act governed, and that is International Brotherhood of Teamsters, etc., vs. Riley, decided June 1, 1948 of this year.

Mr. McCarthy: May it please the Court, this matter was before the State Supreme Court of California just the other day in the case of Gerry against Superior Court of Los Angeles. It was decided on June 16, 1948. This is in an equity court and no matter what you do with it, this is still an equity court, and if your Honor decided injunction was proper, you would have to issue it, whether it was in the prayer or not. The court of equity, once it takes a dispute, must totally solve it. That is the basis of our equity jurisdiction, not the prayer for relief, that gives this court equity powers.

Now the situation here is that the Court was not interested in injunctive features in the slightest. The Court was interested primarily in jurisdiction. This arose on the question of concurrent jurisdiction, and the same situation applies to the federal district court:

"It is the petitioner's argument that the state courts have concurrent jurisdiction with [209] the

federal courts to enforce rights created by a federal statute. Inasmuch as the laws of the United States are as binding on citizens and courts as state laws, state courts competent to exercise it have concurrent jurisdiction with the federal courts to enforce federal laws unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction creates the duty to exercise it. (Citing cases.) In Bethlehem Steel Co. v. New York State Labor Relations Board, April, 1947, 330 S. T. 767, 67 S. Ct. 1026, 1029, 91 L. Ed. 1234, it was recognized as a settled rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of that result be wanting citing Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432. At the same time the Supreme Court also pointed out that Congress had not seen fit to lay down even a general guide to the construction of the National Labor Relations Act as it sometimes does (referring to the Securities Act of 1933, Sec. 18, 48 Stat. 85, 15 U. S. C. A. Sec. 77r; Securities Exchange Act of 1934, Sec. 28, 48 Stat. 903, 15 U. S. C. A. Sec. 78bb; United States Warehouse Act, Sec. 29, 39 Stat. 490, 46 Stat. 1465, 7 U. S. C. A. Sec. 269) [210] by saying that its regulation either shall or shall not exclude state action. This court has also recognized that when the question is whether a state court may take jurisdiction of matters arising under a federal law inquiry is first directed to the intention of Congress in that regard. Miller v. Municipal Court, supra, 22 Cal.

2d 818, 836, 142 P. 2d 297. Therefore, whether concurrent state jurisdiction exists is a matter to be determined from a construction of the act itself."

The California Supreme Court recognized you simply can not just take this act as amended, but you have to go back to the original act and properly consider it:

"A proper conclusion depends in part upon the construction of the act before the 1947 amendments. Pursuant to section 10 of the National Labor Relations Act, 29 U. S. C. A. Sec. 160, the National Labor Relations Board was empowered, upon issuing a complaint and notice, to conduct a hearing on a charge of employer unfair labor practices defined in the act and to issue a cease and desist order, together with orders for affirmative relief. Such orders were enforced by petition to the Circuit Court of Appeals which was empowered to conduct a hearing and render a decree (including temporary injunctive [211] relief) enforcing, modifying and enforcing, or setting aside the order of the board. For the purposes of section 10, the limitations imposed by the Norris-La Guardia Act, 47 Stat. 70, 29 U. S. C. A. Secs. 101-115, upon the issuance of restraining orders and injunctions in cases involving labor disputes were removed.

"By section 10(a) before amendment the power thus reposed in the National Labor Relations Board was made 'exclusive' and not 'affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.' In Amalgamated Utility Workers v. Consoli-

dated Edison Co., 309 U.S. 261, 264, 60 S.Ct. 561, 563, 84 L. Ed. 738, the Supreme Court said, with reference to providing the remedy for the specified unfair labor practices: 'Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.' The Supreme Court pointed out that the course of proceedings was definite and restricted; that the board and the board alone could determine whether an employer had engaged in an unfair [212] labor practice; that the board was chosen as an instrument or agency, exclusive of any private person or group, to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce, and that the board alone was authorized to take proceedings to enforce its order. The sole authority of the board to secure prevention of unfair labor practices affecting commerce was thus recognized. That section 10 of the National Labor Relations Act committed to the board the exclusive power to decide whether unfair labor practices by the employer had been engaged in and to determine the action that should be taken to remove or avoid the consequences thereof was again stated in National Licorice Co. v. National Labor Relations Board, * * *"

I am omitting the citations as I read:

"Also, National Labor Relations Board vs. Jones & Laughlin Steel Corporation * * *"

That, your Honor, is the first case under this act and the leading case:

"* * * upheld as constitutional the vesting of the exclusive power in the board. The most recent pronouncement of the Supreme Court to come to our attention is in Bethlehem Steel Co. v. New York State Labor Relations Board * * * wherein it was held that state and [213] federal action covering the subject matter of the National Labor Relations Act could no co-exist. Similarly in Blankenship v. Kurfman, 1938, 7 Cir., 96 Fed. 2d 450, 454, it was held that the National Labor Relations Act might not be construed as intending to create rights for employees which could be enforced in federal courts independently of action by the National Labor Relations Board; that it was clear that the only rights which were made enforceable by the Act were those which had been determined by the board to exist under the facts of each case, and that when determined the method of enforcing them provided by the Act must be followed. In Fur Workers Union, Local 72, v. Fur Workers Union, 70 App. D. C. 122, 105 F. 2d. 1, with reliance on the Blankenship case, such double jurisdiction was likewise held to be contrary to the intent manifested by the provisions of the National Labor Relations Act."

And I might say the last two cases I have read from the quotations here are federal circuit court decisions. The Blankenship case was a circuit court opinion and the Fur Workers was a circuit court opinion.

"The Supreme Court of the United States has also recognized the application of the 'long settled

rule of judicial administration that no [214] one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted'—referring to the application to the National Labor Relations Board for determination of the factual issues and the appropriate relief designated in the National Labor Relations Act."

Citing Supreme Court cases, citing numerous cases here also.

"In a different category are cases such as Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board * * *, wherein it was held that the state's exercise of its police power (e. g., the prevention of mass picketing of the employer's factory, threatening personal injury or property damage to employees desiring to work, obstructing entrance to and egress from the employer's factory, obstructing the streets and public roads, picketing the homes of employees, and other breaches of the peace in connection with labor disputes) was not intended to be excluded by the provisions of the National Labor Relations Act, and that the exercise of that power by the state could stand consistently with the operation of the federal act. State power in the field not occupied by the National Labor Relations Act has been appropriately exercised or recognized in other cases. (Citing cases.) Cases relied on which were [215] decided before the 1947 Act (assuming they involved interstate commerce), in which peaceful picketing for unlawful purposes has been enjoined by state action are therefore not in point. Under the National

Labor Relations Act before amendment by the 1947 Act, unfair labor practices on the part of employee organizations were not included within the jurisdiction of the National Labor Relations Board. It was therefore a sphere in which action could be initiated in the courts.

"As noted, the National Labor Relations Act before its amendment by the 1947 Act did not define or place within the scope of the National Labor Relations Board's jurisdiction unfair labor practices on the part of labor organizations. By section 8 (b) of the 1947 Act the conduct charged to the defendant unions in this case is declared to be unfair labor practices.

"Prior to the 1947 amendment the powers of the board under section 10 of the act were limited to the issuance of cease and desist orders against employers, after investigation and hearing, and the enforcement thereof by petition to the Circuit Court of Appeals for injunction and other process. Concurrently with the inclusion of the 1947 Act of declared [216] unfair labor practices by labor organizations (section 8(b)), Congress deemed it expedient to provide accelerated means for obtaining injunctive orders. Under the 1947 Act a temporary restraining order may be obtained after the issuance of a complaint by the board as to any unfair labor practice, by petition filed in the United States District Court, upon notice and hearing (sec. 10(j)). In certain cases of unfair labor practices by labor organizations designated in section 8(b), the duty to apply for temporary injunctive relief is mandatory whenever preliminary investi-

gation by the board indicates reasonable cause for belief that the charge is true (sec. 10(1)). Section 10(h) removes the restrictions and limitations upon the equity jurisdiction of United States Courts imposed by the Norris-LaGuardia Act insofar as action by the National Labor Relations Board is concerned."

(Citing cases.)

"The provision of section 303(a) of the 1947 Act restricting the unlawfulness there declared to the purposes of that section discloses an intent not to authorize criminal prosecutions for the commission of the specified unfair labor practices by labor organizations. The section then permits suits in district courts of the United States [217] and other courts having jurisdiction of the parties for the recovery of damages occuring from the 'unlawful' acts on the part of labor organizations. This is the only jurisdiction over suits by private parties which is expressly recognized by the act. In designating the nature of the board's power in section 10(a) of the 1947 Act, Congress omitted the word 'exclusive' from the National Relations Act. The petitioner argues that the omission implies an intent to permit injunctive relief as well as damages at the suit of parties injured by the designated unfair labor practices committed by labor organizations. But in amending that section to eliminate the word 'exclusive,' Congress also added a proviso empowering the National Labor Relations Board by agreement to cede to state agencies jurisdiction in any industry (with certain exceptions) although

a labor dispute affecting interstate commerce was involved, where the local regulatory provisions were consistent with the federal act. The word 'exclusive' would be inconsistent with the exercise of ceded power by agencies created pursuant to the state regulatory legislation invited by the proviso.

"The provisions of the 1947 Act show an intent to preserve the functional purposes of the [218] National Labor Relations Act which increased objectives, and an intent not to confer powers on the courts at the suit of private parties with the exception of the jurisdiction expressly granted, which does not include the exercise of equity powers. This intent is also indicated by the record of the conference and committee reports and congressional debates.

"The pertinent portions of those reports and debates were reviewed by the Fourth Circuit Court of Appeals in Amazon Cotton Mill Co. v. Textile Workers Union of America, 167 F. 2d, 183, 188. The appeal in that case involved the jurisdiction of the federal district court under the National Labor Relations Act as amended by the 1947 Act to issue an injunctive order at the suit of a labor organization. A mandatory injunction theretofore issued by the District Court required the employer to bargain collectively with a union of its employees.

* * *"

In other words, the Amazon case was reverse of what you have today. There the union was asking that the employer be ordered by the court to bargain.

"* * * It was concluded that the history of the National Labor Relations Act and the decisions rendered thereunder made it clear that the purpose of the Act was to establish a single paramount [219] administrative authority in connection with the development of federal law regarding collective bargaining that the only rights made enforceable were those determined by the National Labor Relations Board to exist under the facts of each case; that there was nothing in the text or the history of the enactment of the 1947 Act which indicated a departure from the foregoing purposes or policies, or showed any intention to vest jurisdiction in the courts except to the limited extent that jurisdiction was expressly conferred; that only under Section 303 was jurisdiction given to entertain actions brought by private parties and then only to render judgments for damages arising out of jurisdictional strikes and boycotts. That court also reached the conclusion from a study of the new Act and the conference reports that the purpose of omitting the word 'exclusive' from Section 10(a) of the National Labor Relations Act was merely to synchronize with the power reposed in the board the added elements of jurisdiction expressly vested in the courts and which may be ceded to state agencies under the 1947 proviso of said section. The court said: 'There is nothing in the history of the Act, the reports of committees or the debates in Congress which even vaguely supports [220] the contention that its effect was to vest jurisdiction in the District Courts to grant relief against unfair labor practices. Everything said by any one re-

motely bearing on the matter is to the contrary. * * * It is hardly thinkable that, if the effect of the Labor Management Relations Act was to make a fundamental change in the jurisdiction to deal with unfair labor practices, this important fact would not have dawned upon some members of the House or the Senate and have been referred to in the course of the lengthy debate of a measure that was passed over a Presidential veto. That no such suggestion was made gives ample support to the interpretation which, as we have already indicated, we would place upon the text of the Act if the history of its passage and Congressional debates were not available to us.' The court mentioned cases in trial courts where injunctive relief had been denied (Douds v. Wine, Liquor & Distillery Workers Union, D. C. 75 F. Supp. 447; Fitzgerald v. Douds, D. C., 76 F. Supp. 597, Southern District of New York; and the present case), * * *"

In other words, the Fourth Circuit referred to the Gerry case:

"* * * and referred to the disastrous consequences * * *" and this is very important:

"* * * to any successful administration of the labor [221] law, and the repugnance to the orderly administration of justice, if courts should take coordinate jurisdiction with the National Labor Relations Board to restrain unfair labor practices. The court also noted the absurdity which would result from unauthorized court actions at the suit of labor organizations, since Congress clearly intended to withhold redress on a charge of unfair

labor practices made by a labor organization unless the latter had filed certain financial statements and affidavits (Sec. 9(f), (g), (h)). Not overlooked was the possibility that unusual cases might arise where courts of equity could be called upon to protect the rights created by the act. But the court recognized that the case involved nothing out of the ordinary, that the procedure before the board provided an adequate administrative remedy, and that the extraordinary powers of a court of equity could not be invoked until the administrative remedy had been exhausted. (Citing cases.) No question is here presented as to what the situation would be if the petitioner had exhausted its administrative remedy.

"The reasons for concluding that express jurisdiction was not conferred on federal trial courts at the suit of a private party to restrain alleged unfair labor practices, as held in the Amazon Cotton [222] Mill Co. case, likewise compel the conclusion that the nature and purpose of the act preclude state action in the field of the jurisdiction vested in the National Labor Relations Board except to the extent that it has been expressly conferred or ceded, and that this is so whether such action be initiated by an employer or by a labor organization. General language in Park & Tilford Import Corporation v. International, etc., of Teamsters, supra, 27 Cal. 2d at page 604 et seq., 165 P. 2d at page 894, and Lillefloren v. Superior Court, 31 Cal. 2d ...., ..., 189 P. 2d 265, indicating that the state courts might enjoin union activities affecting interstate commerce if engaged in for

an unlawful purpose is not controlling here. It is necessarily restricted to the period prior to the effective date of the 1947 Act when no administrative remedy was afforded to prevent unfair labor practices on the part of labor organiaztions.

"Other contentions do not require specific notice. The petitioner makes much of the fact that the defendant unions, as alleged in the complaint in the action, have not filed the required financial reports and affidavits under the 1947 Act which are a prerequisite to the exercise of jurisdiction by the [223] Labor Relations Board * * *" etc., and so on.

The Court: I am ready to take this position now, that the National Labor Relations Board have exclusive jurisdiction in all matters having to do with charges of unfair labor practices. I am also inclined, I might say, to hold—and I will hold, unless Mr. Brown can show me some good authority to the contrary—that the National Labor Relations Board has exclusive jurisdiction in the first instance to determine whether or not it has jurisdiction of any matter which may arise out of the Taft-Hartley law.

Mr. McCarthy: If you would permit me please, your Honor, because I would like to have you notice this in reference to the Gerry case. The Gerry case made specific reference to 8 A 3 of the Act when the court said they had no jurisdiction to determine such matters. I should like to call your attention to the complaint, Section 7. Mr. Brown asked me why I felt that this was applicable. This is petitioner's allegation in paragraph VII:

"That your petitioner is informed and believes and therefore alleges the fact to be that respondents will not negotiate or bargain upon any other assumption than that they are not covered by the provisions of the Labor Management Relations Act of 1947 and that they have determined that they [224] will not comply with the provisions of Section 8 A 3 of said Act; * * *" The very section that is referred to in the Gerry case itself.

The Court: That 8 A 3, what number is that in this U.S.C.A.?

Mr. McCarthy: It would be Section 3.

"* * * Provided, that nothing in this Act, or in any other statute of the United States, shall preclude any employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement * * *."

Now the charge is made here that this union will not comply [225] with this provision of the

Act and in the Gerry case the court says that a charge to that effect is charging an unfair labor practice and refusal to bargain in good faith, and that is a matter for the Board. Now you can't deliberately charge people with committing unfair labor practices in specific language and then say, well, because we do not ask for that kind of relief, the charge ceases to be a charge of unfair labor practices. They say further:

"That the continuation of said condition aforesaid referred to as the 'union security clause' or 'closed shop' provision of the master contract would be in direct violation of Section 7 of the Labor Management Relations Act of 1947, the same being a Federal Statute."

That is the concluding sentence of Paragraph VI.

Now if it is a direct violation, it is an unfair labor practice. If it is an unfair labor practice, the law under the Gerry case must decide. There is no such device as declaratory relief to take away jurisdiction from one federal agency and allege it in a court, because it is only a device. They are saying, "We are charging you with all these unfair labor practices; we have a forum where we can have this matter determined; we know that the district court has no jurisdiction to determine them, so we are going to ask you for an advisory opinion by way of declaratory relief, and by [226] means of that device we are going to confer that jurisdiction which Congress has expressly refused to the district court." I say you just can't do it.

Mr. Penfield: If the Court please, a lot of time was had in Mr. McCarthy's reading of the Gerry case. The Court, I think, stated better than I possibly could the argument concerning this whole jurisdictional question, and there is no point in my repeating it. There are a couple of points your Honor suggested that I do want to stress.

Mr. Brown now says that he concedes that the Board has jurisdiction to decide unfair labor practices, but he says, where is authority that only the Board can decide whether a particular business affects commerce. I submit Section 8(a) of the Act sets forth the Board has jurisdiction over unfair labor practices affecting commerce. What is unfair labor practice? To determine whether or not there is an unfair labor practice, we have to determine whether or not it affects commerce, and he is asking to determine that. In other words, he is asking this Court to assume concurrent jurisdiction with something that the Board has to do in every unfair labor practice dispute that comes up. We submit that can not be done. As the Gerry case points out very clearly, the jurisdiction of this court is limited by the Congress act to injunction suits, limited to damage suits in certain types of cases under Section 303, and that is the extent of the jurisdiction [227] and there isn't any concurrent jurisdiction in matters relating to unfair labor practices and the question of whether the matter affects commerce or not obviously relates to unfair labor practices, otherwise what is the purpose, that this particular business affects commerce? Unless

it has relationship to unfair labor practices and matters set forth in the complaint, it is meaningless. So we submit the whole thing has to come through us. The question whether business affects commerce, as well as whether it is an unfair labor practice, is something that we decide in every case. We submit that that jurisdiction should be in us and I would like to submit the matter on that issue.

The Court: Before Mr. Brown proceeds, it might be well to take a recess at this time until 1:30.

Mr. McCarthy: First I would like to pose this problem because I think in fairness to Mr. Brown he should face it. If your Honor should decide that these respective parties are in a business which affects interstate commerce within the meaning of the Act and make a declaratory judgment, the union conducted the election provided for in Section 8 A 3, the Board would, upon the filing of that petition, have to make its determination as to whether or not you were in a business affecting commerce. If the Board decided you were not in a business affecting commerce that would permit any election, they would say that we are free of any restrictions of the Taft- [228] Hartley Act in our dealing with the employers, and we would find ourselves in the position of having this court having said one thing and the Board having said the direct opposite and these people would have us telling you that you have to sign a closed shop contract and like it,

insofar as the Taft-Hartley Act is concerned, because the Labor Relations oBard said it did not have jurisdiction and therefore we are free to insist upon it.

The Court: After hearing the argument this morning, I do not think you have anything to worry about on that score, unless Mr. Brown is able to establish to me that the International Labor Relations Board has no jurisdiction to determine whether or not a certain group or union is affected by interstate commerce, or affects interstate commerce. In other words, if the National Labor Relations Board has jurisdiction in any case that may be presented to it involving labor practices, unfair or otherwise, to determine whether or not the Taft-Hartley law applies, if such jurisdiction exists, and if it is concurrent in the court—it may not be—my view is that the administrative remedy should be first pursued and I will dismiss the complaint. That is the way I feel about it, so what Mr. McCarthy has to say here would not be important to consider unless I change my views after hearing Mr. Brown. Unless he convinces me that the National [229] Relations Board has no jurisdiction.

(Recess taken at 12:00 noon.)

Afternoon Session—1:30 p.m.

The Court: Are you ready to proceed now, gentlemen?

Mr. Brown: Yes, your Honor. May it please the Court, this matter on the motions that I think

your Honor is interested in, should be interested in at this time, is this: Does this Court have jurisdiction, or is the jurisdiction to determine the question of whether or not this particular industry, the employers and employees, in their negotiations are governed by the federal act, whether or not that question to determine is exclusively within the jurisdiction of the National Labor Relations Board. In other words, does this Court have any jurisdiction under the complaint seeking a statutory remedy in the nature of a declaratory judgment.

Now I am going to indulge and invite the Court's attention to the proposition that since we have the burden to bear, if the Court will be kind enough to bear with us until we develop our theory, it will be appreciated. Now in the first place, we recognize that Section 400, Title 28, which provides for the remedy of a declaratory judgment, does not in any way confer additional jurisdiction upon federal district courts. That section is essentially one which affords an additional remedy which may be pursued in certain cases to [230] obtain an adjudication of disputed facts or law in an actual controversy, and therefore we would like to discuss this thing and make two points: first, we have a remedy which enables this Court to grant the relief prayed for in the complaint, but prior to applying this remedy, the first question is, does the Court have jurisdiction. Now I am not talking about exclusive jurisdiction, I am talking about jurisdiction initially and then we will endeavor to

meet the question of exclusive jurisdiction. This action, if it be justified at all, is brought under the jurisdiction of the district court by virtue of Section 41, Sub-paragraph 8, of Title 28 U.S.C.A. It reads:

> "The District Courts shall have original jurisdiction as follows: * * *"

and then after the enumeration of forty different instances, Section 41(8): "Suits under interstate commerce laws." Now this procedure is within the jurisdiction of federal courts under the provision of Congress conferring the jurisdiction under this section of Title 28, providing for jurisdiction in federal courts by reason of the involvement of a federal statute concerning interstate commerce. The statute which petitioner asked to have declared applicable under Labor Management Relations Act of 1947 provides—now there isn't any change essentially in the jurisdictional provision of the Wagner Act and the Taft-Hartley Act, but Section 1, Subsection (b) of the Taft-Hartley Act reads as follows: [231]

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor

and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

Now Section 101, the National Labor Relations Act, is hereby amended to read as follows:

"The denial of some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially [232] affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; * * *"

And then Section 2 provides a definition, subparagraph 6:

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Whether we are engaged in interstate commerce, of course, if the case were only on that, to be heard on the merits, would be immaterial at this time. I am merely indicating those provisions of the Taft-Hartley Act, Section 41, sub-paragraph 8 of Title 28, U.S.C.A., as to original jurisdiction [233] in cases where the suits affect interstate commerce law. The Taft-Hartley Act is obviously one interstate commerce act of Congress.

Now in American Federation of Labor vs. Watson, 90 Law Ed. 873—and I will have to get the U. S. citation, I know your Honor desires that—in that case a number of Florida local labor organizations and individuals engaged in interstate commerce alleged that the amendment to the Florida Constitution prohibiting closed shops conflicted with the old National Labor Relations Act. The Supreme Court of the United States sustained the jurisdiction of the district court in the following language:

"For it is the view of a majority of the Court that jurisdiction is found in Section 24(8) of the Judicial Code, 28 U.S.C.A. Section 41(8), 7 F.C.A. Title 28, Section 41(8), which grants the federal district courts jurisdiction of all 'suits and proceedings arising under any law regulating commerce.' * * *"

Now, of course, that section has been amended now to read:

"Suits under interstate commerce law."

"* * * As we have said, the bill alleges a conflict between the Florida law and the National Labor Relations Act. The theory of the bill is that labor unions, certified as collective bargaining representatives [234] of employees under that Act, are granted as a matter of federal law the right to use the closed-shop agreement or, alternatively, that the right of collective bargaining granted by that Act includes the right to bargain collectively for a closed shop. Whether that claim is correct is a question which goes to the merits. It is, however, a substantial one. And since the right asserted is derived from or recognized by a federal law regulating commerce, a majority of the Court conclude that a suit to protect it against impairment by State action is a suit 'arising under' a federal law 'regulating commerce.' "

Citing a number of cases.

Now may it please the Court, that case was a little different on the facts than our case, because in that case the unions had requested the federal district court for injunction against the State authorities from bringing any action under the Florida anti-closed shop act, and the Supreme Court dismissed that because they said, after they sustained the jurisdiction of the lower court, they said that irreparable injury was not shown, there is no injunctive relief. The case is cited to the particular point of jurisdiction of this court.

Now the next point I want to take up is this: the question of whether or not—now I want to leave this exclusive [235] jurisdiction of the National Labor Relations Board to the end to tie in with the balance of this. The next question logically is, is the declaratory judgment remedy proper? I have run across one case since we discussed this matter before your Honor before. It will be remembered that the federal declaratory judgment act was primarily the outgrowth of your union declaratory acts which existed in most of the States, one of those States being the State of New Hampshire and in June of this year, 1948, the Supreme Court of New Hampshire, in the case of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 633, et al. v. Riley, et al., cited in 59 Atlantic (2), at page 476, they had occasion there to say something about the appropriateness of the declaratory remedy in respect to this very matter. In the syllabus as contained in the advance sheet we find the following:

"The purpose of the declaratory judgment law is to make disputes as to rights or titles justiciable without proof of a wrong committed by one party against the other."

Then they go on, the second paragraph of the syllabus:

"Question whether the Taft-Hartley Act or the Willey Act * * *"

Now the Willey Act was a State Act:

"* * * determined validity of contract between union [236] and employer was a proper matter

to be determined by a declaratory judgment in advance of actual controversy between the parties, and petition was improperly dismissed as to employer though he did not claim adversely to any right of the union."

And then they go on to hold in this particular case essentially is: they gave a declaratory judgment, the Supreme Court of New Hampshire, and they said that where Congress gave the authority to legislate in respect to matters affecting interstate commerce, that in their opinion the Taft-Hartley bill governed the provisions of this particular contract, but the interesting thing in that case is the statement of facts. This was a petition in the New Hampshire court for a declaratory judgment by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 633, an affiliate of the American Federation of Labor, and it was against William H. Riley, Labor Commissioner, Ernest R. D'Amours, Attorney General, and others, for determining whether provisions of Laws 1947, Title 195, are applicable to petitioners. The case was transferred without ruling on an agreed statement of facts.

"Petition for a declaratory judgment, in which it is alleged that the petitioners, on February 8, 1947, entered into a contract with the defendant Faltin to take effect as of January 1, 1947, and continue [237] in effect until twelve o'clock midnight, December 31, 1948; that one of the terms of said contract is as follows:

"(c) When an Employer lacks a full complement of men, the Union (Business Agent, office of shop steward) shall be notified. If the Union can not furnish members, upon request by Employers, non-members may be employed subject to the terms of this agreement, but such non-members must meet the membership requirements of the Union within two (2) weeks from date of employment. The Employer will, after three (3) days notice from an authorized representative of the Union, discharge any employee who fails to become, or to remain, a member in good standing of the Union;' that the defendants Riley and D'Amours, who are respectively the Labor Commissioner and the Attorney General of New Hampshire, claim that 'provisions in said contract between said Local Union No. 633 and the said defendant Joseph E. Faltin requiring membership in Local Union No. 633 as a condition of securing or continuing the employment of any person are unlawful by virtue of Chapter 195 of the Laws of 1947, and have informed your petitioners that they will be prosecuted in the event that said Local Union No. 633 or any of your petitioners undertake to enforce and carry out the [238] provisions of said contract requiring membership in said Union as a condition of securing or continuing the employment of any person.' "

Now the court went on:

"It is the position of the petitioners that the Labor Management Relations Act of 1947, 29 U. S. C. A. Section 141 et seq., supersedes the provisions of Laws of 1947, Chapter 195, so far as the pro-

visions thereof are applicable to the business engaged in by your petitioners and the defendant Joseph E. Faltin, which is conceded to be wholly interstate commerce, and that said contract will be lawful until the termination of said contract on December 31, 1948 by virtue of the provisions of said contract and the provisions of Section 102 of the Labor Management Relations Act of 1947, passed by the Congress of the United States of America. The petitioners, accordingly, pray for a declaratory judgment, 1, that the provisions of Laws 1947, c. 195, are not applicable to petitioners and the defendant Joseph E. Faltin as proprietor of J. E. Faltin Transportation Company in the business in which they are engaged; 2, that the above article between Local Union No. 633 and the defendant Joseph E. Faltin is not unlawful and that the petitioners will not be liable to prosecution or for [239] civil liability for damages by reason of any provisions in the Laws of 1947, Chapter 195.

"Transferred without ruling by Lampron, J., upon an agreed statement of facts."

Then the case goes on and goes into the proposition of whether or not the Taft-Hartley Law applies or the State law, and the court finally comes down:

"It is, therefore, our conclusion that there is nothing in Section 14(b) of the Taft-Hartley Act which abrogates the rule that 'Congress having entered this field of regulation, it follows from the paramount character of its authority that State regulation of the subject-matter is excluded.' "

Citing Texas & Pacific Railway Co. v. Rugsby, supra (241 U. S. 33, 36 S. Ct. 485.)

"* * * and we accordingly hold that the regulatory provisions of the Willey Act are superseded by the Taft-Hartley Law as to the contracting parties and the individual plaintiffs herein."

Now, may it please the Court, it is an unfortunate situation in the case before the Court that certain matters of pleading occur because essentially here is where we are. It occurs to the petitioners in this matter that perhaps we have been confused in our reasoning, for this reason, that [240] obviously, if the complaint is read carefully, there were certain allegations therein which indicated facts constituting an unfair labor practice under the Taft-Hartley law, just as there was in this New Hampshire case. In other words, these people had a contract which provided for a closed shop and which, according to the statement of fact, would have constituted an unfair labor practice under the Labor Management Act of 1947, but those allegations were contained in the petitioner's complaint for two reasons, not to allege an unfair labor practice, but (1) to indicate certain threatened alleged acts tending to the conclusion of irreparable injury upon which we sought to obtain a preliminary restraining order; (2), to show the serious nature of a substantial, actual, right controversy, which the Court would be authorized, under the declaratory judgment act, to decide. Now that being the case, essentially this is the situation from the complaint: We are not endeavoring to prohibit or to prevent an unfair labor practice. We are not

endeavoring, at this stage of the proceeding, because the Court has already said that the Norris-LaGuardia Act has taken away its authority to award ancillary injunctive relief. We are now arguing our complaint upon the merits, as to the question of the Court's jurisdiction, and what are we asking for when all these other ancillary matters are deleted from our consideration? We are doing just as they did in the New Hampshire case, we are asking whether or not, by reason of the allegations [241] concerning the activities of this industry in interstate commerce, whether that makes the Labor Management Relations Act of 1947 applicable or whether it is not applicable. Now that is the point.

Now this matter of declaratory judgment was really never properly gone into by any court at length until the decision of Justice Hughes in Aetna Life Insurance Company of Hartford, Connecticut, vs. Edwin P. Haworth and others. It was decided in 1947, March 1st. The citation is 300 U. S. 227, and there is some very clear doctrine in that case as to just exactly—I am reading now from Law Ed. page 620. In this case Haworth had some insurance policies with the insurance company, I think about five of them, and some of the provisions of the insurance policies provided, in effect, that in the event Haworth were to suffer permanent and total disability that he would no longer be required to pay premiums and that the policies would be paid to the beneficiary upon his death. That matter was a controversy, a dispute. He had refused to pay the premiums. The

insurance company had written back several times and told him that they considered the policies lapsed because of non-payment of premiums and in the complaint they set up that if the policies were still in force and effect, the company would have to maintain a legal reserve of twenty thousand dollars and that while no injury had occurred as yet, that was such a type of controversy [242] that could be adjudicated and the rights determined under the declaratory judgment act. The court said:

"The complaint asks for a decree that the four policies be declared to be null and void by reason of lapse for non-payment of premiums and that the obligation upon the remaining policy be held to consist solely in the duty to pay the sum of $45 upon the death of the insured, and for such further relief as the exigencies of the case may require."

Now:

"The Constitution limits the exercise of the judicial power to 'cases' and 'controversies.' 'The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.' Per Mr. Justice Field in Re Pacific R. Commission, * * * 32 F. 241, 255. (Citing case.) The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of defini-

tion. Thus the operation of the Declaratory Judgment Act is procedural [243] only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. (Citing cases.) Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. The judiciary clause of the Constitution 'did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.' (Citing cases.) In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of Congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends."

Now:

"A 'controversy' in this sense must be one that is appropriate for judicial determination. (Citing cases.) A justiciable controversy is thus distinguished from a difference or dispute of a [244] hypothetical or abstract character; from one that is academic or moot. (Citing cases.) The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. (Citing cases.) It must be a real and sub-

stantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

Citing a long list of federal cases.

"Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. (Citing cases.) And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required." (Citing cases.)

"With these principles governing the application of the Declaratory Judgment Act, we turn to the nature of the controversy, the relation and interests of the parties, and the relief sought in the [245] instant case."

And then there was an objection argued extensively in that case by the other side, to the effect that the declaratory judgment act only provides for those kind of cases where the facts are not disputed, but it has been definitely pointed out by the second proposition in this Aetna Life Insurance case:

"There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations aris-

ing from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract."

Then they go on to say, on page 622, in the middle of the right-hand column:

"That the dispute turns upon questions of fact does not withdraw it, as the respondent seems to contend, from judicial cognizance. The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is everyday practice. Equally unavailing is respondent's contention that the dispute relates to the existence of a 'mutable fact' and a 'changeable condition—the state of the insured's health.' The insured asserted a total and permanent disability occurring prior to October, 1930, * * *" etc. [246]

The declaratory judgment business, by virtue of Rule 57, can be summed up in this way: The declaratory judgment is essentially one of construction. The declaratory remedy is cumulative and alternative, not exclusive. Federal Rule 57 so provides. Existence of another adequate remedy does not preclude judgment for advisory relief in cases where it is appropriate. To the same effect in Section 1 of the Uniform Act. By the same token, this form of relief does not supersede federal type of remedy. It is supplemental and does not supersede. It is supplemental to existing remedies.

Now there is a very important thing that we would like to suggest to the court, which I think has been suggested by Mr. McCarthy, which is not true at all, in our judgment, and that is that

his contention, may it please the Court, in applying the Gerry of California case is not applicable here because in that case it was sought in the California courts by injunctive processes to restrain certain acts of the union, as I recall it, which were denominated as unfair labor practices but which were not unfair labor practices under the California Supreme Court decisions, particularly the Hot Cargo Act. The inference of his argument to the Court would be this, that this declaratory judgment remedy is applied by the federal district court siting in equity or otherwise, but let me point out this in that respect—I am [247] now reading from Mr. Duvall's article in Vol. 34 The American Bar Journal, No. 5, May, 1948, from page 381, starting on page 380, the last sentence:

"In this connection, it should be remembered that the declaratory action may be invoked in two types of situations: First, those where no other remedy is available, e. g. where plaintiff seeks a construction of a contract before its breach; and second, where plaintiff desires a determination of another's right to build a certain type of structure under plat restrictions, he could bring either a declaratory action or one for an injunction.

"The declaratory action is a special form of action—sui generis. It is neither legal nor equitable, but takes on the color of either, depending upon the nature of the particular facts and controversy involved. In view of the abolition in the federal Courts and most State Courts of the distinction between law and equity actions, exactly the same considerations determine the right to a trial by

jury in the declaratory action as in any other type of case.

"No substantive rights or jurisdictional factors are within the scope of the declaratory Acts, which are entirely procedural. Therefore, the jurisdiction [248] of the Courts in actions thereunder is no greater or different than in the coercive form of action."

Then he goes on as to the requisites. The first requisite:

"There must be a justificable controversy; that is, a controversy 'that is appropriate for judicial determination'; one that is not of 'hypothetical or abstract character' or that is 'acadamic or moot.'

"2. The controversy must be between parties whose interests are adverse.

"3. There must be a tangible legal interest in the controversy by the party asserting it.

"4. The issue presented must be ripe for adjudication."

Now I observe that one of the allegations of the various motions filed by the Board and respective counsel is that the complaint does not state facts sufficient to indicate an actual controversy. That matter has not been presented as yet because it would seem that the matter of jurisdiction must be determined before we go to that other objection. It is conceded, may it please the Court, that prior to the amendment of the National Labor Relations Act of 1935 that Congress made the National Labor Relations Board exclusive in respect to [249] jurisdiction in respect to the prevention of unfair labor practices, and we concede the point, may it please

the Court, that if we were to invoke the remedies provided for under the Taft-Hartley Act, that we would have to proceed by filing a complaint with the Board in the proper case and that then the Board would proceed with its administrative procedure of making an investigation, perhaps have a trial examiner of the matter.

The Court: Let me ask you a question, have you brought such? Wouldn't the Board investigate its jurisdiction?

Mr. Brown: Well, of course, your Honor, that is absolutely a correct statement because——

The Court (interrupting): Suppose it went further and did investigate this jurisdiction and found that the particular labor organization or employer was not engaged in, or in fact he had anything to do which affected interstate commerce, then the Board would decline to act further and then the complainant could have remedy in the Circuit Court of Appeals.

Mr. Brown: Right. That is correct, but if I may suggest, because I think I know what is bothering the Court in respect to that matter, and that is simply this: When you analyze our complaint, as the matter now stands, we are not alleging an unfair labor practice; that is, we did at the beginning of this thing, but your Honor has determined that [250] matter. That is behind us. The only matter now that is essential in this complaint is the proposition that we are trying to bargain with these people and we must take the allegations of the complaint to be true upon a motion of this kind, and that the bargaining has broken down because of

the controversy, to-wit: are we under the federal act or are we under State legislation? What could we petition the Board for, may it please the Court? The only thing, as we stand before your Honor now, that we are asking for—are we covered by the federal act or the State? The Board would say, just like Mr. Denham said, they would say, "Well, Section 10(a) gives the Board power as hereinafter provided" to do what? To prevent any person from engaging in any unfair labor practices listed in Section 8.

The Court: Do you mind if I interrupt you again? I don't want to interfere with the trend of your argument. Suppose the practice that you have indulged in in this action became quite common. It would be possible that you would have in every judicial district in the United States one or a great many cases of the same character, depending upon the extent of the population of the different places. One judge in Los Angeles might decide under a certain set of facts the Taft-Hartley law did not apply. Another judge in Los Angeles United States Court, under the same set of facts might decide that it did apply. Your Ninth Circuit Court of Appeals would be [251] deluged with appeals and that would be the situation all over the United States. Now that is the thought I have right now. Maybe that is the reason why Congress has set up the National Labor Relations Board an administrative body to determine that question, among other matters. I do not believe there is any question but what the National Labor Relations Board has the power to determine whether or not a cer-

tain labor organization is or is not engaged in an industry or practice affecting or having to do with interstate commerce. All right. If that is the situation, an administrative authority given an administrative body created by Congress for a purpose, I do not mind telling you now that if that is the situation, my views are that that administration should be drained first.

Mr. Brown: I appreciate that, your Honor. But if I may be permitted—if we were coming in here at this stage of the game—I want to confess ignorance on the applicability of the Norris-La-Guardia Act when I appeared before the Court before—in other words, if we were asking additional remedies, if we were in here to seek some other remedy through either injunction other than damages, as authorized by 303(a) of the Taft-Hartley Act, then we would have come under Section 10 (a) of the Act, and that limits the powers or the jurisdiction of the Board, and what does it do:

"The Board is empowered, as hereinafter [252] provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power will not be affected——"

The Court (interrupting): You might stop right there. I want to get this thing right, whether it is favorable to your side or the other. Now read that last statement that you made from that section.

Mr. Brown: This is Section 10(a):

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in

any unfair labor practice (listed in Section 8) affecting Commerce.''

The Court: Right there—so it appears necessary for the Board, and the Board has ample power, to determine whether any practice affects interstate commerce.

Mr. Brown: That is right.

The Court: And the Board would have ample power to determine whether any organization, individual, group, labor employer or employee, in its practices or in its industry or activities, and so on, affects interstate commerce.

Mr. Brown: Correct, your Honor, but may I answer this. Paragraph (b) of Section 10 provides as follows:

"Whenever it is charged that any person [253] has engaged in or is engaging in any unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

And then it goes on as to how they carry out those procedures, the fact that the Board is empowered to petition for a restraining order. We, may it please the Court, are not asking or charging

the unions with an unfair labor practice. We want to prevent an unfair labor practice by carrying out the very purpose of the federal declaratory judgment act to determine, are we under this set of rules or that set of rules, so that we will not be, nor the respondents, subjected in any way to the penalties that accrue by reason of a violation. There are damage responsibilities provided upon employers and unions, criminal offenses and imprisonment provision in the Taft-Hartley Act, and all the rest of it. Now the only purpose of a declaratory judgment act is to permit suits, not only of a contract, but [254] the right and title of persons and their properties to be determined before a wrong has arisen. For example, before 1934, unless there was a wrong committed, the United States Supreme Court said, "Well, that is merely academic and there is nothing we can do about it," but under the declaratory judgment act, and as pointed out in that Aetna case, the very purpose of the thing is to have these rights determined before, not after, there has been a breach thereof and for the purpose of determining that before the injury has accrued.

Declaratory Judgment, 16 American Juris, 296, points out:

"Declaratory judgment proceedings have frequently been employed to determine questions as to the construction or validity of statutes, ordinances, and other governmental regulations. The Uniform Act expressly enumerates these questions among those which may be determined thereunder, and other declaratory judgments acts contain sim-

ilar provisions. Moreover, there is authority to the effect that declaratory judgments upon these questions may be rendered even though the statute applicable does not so provide in express terms. Thus, the Federal Declaratory Judgments Act, although it does not mention declarations as to the construction or validity of statutes, has been invoked [255] frequently as a means of assaying the constitutionality of congressional legislation. If, however, an act authorizing declaratory judgments can not be reasonably construed as empowering the court to determine thereunder the validity of a statute or ordinance, it is not likely that any court will assume such authority."

I am going to close now, because I have taken a lot of time, but there is one thought I would like to leave with the Court after we leave.

The Court: I wish you would summarize just what is it you want the Court to do in this case.

Mr. Brown: We want the Court to say something in reference to the operation of this industry wherein the respondents are employed and the employer's conduct to determine whether or not, by the nature of its business activity, it so affects commerce, or is engaged in interstate commerce, so as to fall within the category of industry and operations covered by the Taft-Hartley Act. If the Court so finds, we ask the Court for a declaratory judgment, just as we found in this New Hampshire case that the Labor Management Relations Act of 1947 applies. Then these folks can go on with their bargaining. We are not interested in any unfair labor practices. We can not ask the

National Labor Relations Board [256] that question. The only thing we can ask them is under a complaint charging an unfair labor practice. We recognize our folks as being decent people, we recognize them as being the proper representatives of their members, we want to bargain with them, but neither side know where they stand. We are not charging them at this stage of the game with an unfair labor practice; we wouldn't do it, we couldn't do it.

The Court: Well, is it contemplated now that there is to be or will be a strike as the result of negotiations that may be in conflict with the Taft-Hartley law?

Mr. Brown: At the present time, your Honor—now I am speaking for the record, insofar as the pleadings are concerned, because the Court might as well have that information—in view of the fact that the Court decided that its jurisdiction was limited by the Norris-LaGuardia Act, couldn't continue the status quo further than hearing on the motion for temporary order, naturally as alleged in that complaint, the master contract of May 21, 1948, expired. These people have been going along since that time under certain stipulations, but they have been unable to draft a formal collective bargaining contract because they do not know whether they are under the Taft-Hartley Act or the State law, and if they assume that they are not under the Taft-Hartley Act and they did enter into a contract which has provisions that are different than those permitted by the federal act, then everybody, [257] employer and employee, agents, and

everybody, are then, may it please the Court, subject to certain penalties under the Act. If it can be determined that they are either under or not under the Taft-Hartley Act in this proceeding, then those gentlemen will go about their business and complete the other provisions of the contract to square with the rules under which act they are governed. Now that is all in the world we want. We could not ask the National Labor Relations Board that question, are we under the Taft-Hartley Act? Mr. Denham or Mr. Penfield would come back and say "that is a hypothetical question, asking for legal opinion, there is nothing before the Board under its jurisdiction as prescribed in Section 10(b). However, if you people do come along and you make a contract which you believe constitutes an unfair labor practice and you want to sign a verified complaint before the Board, then we will proceed in the usual course" and the very purpose of a declaratory judgment is to determine, for example, the constitutionality of the statute or ordinance before somebody breaches it and gets himself in difficulty. We are not asking for an interpretation of whether the facts alleged in the complaint constitute an unfair labor practice. We do not care. That state of this proceeding has disintegrated in the past. I think your Honor has our theory. You may not agree with it but I have tried to present it as I see it.

The Court: I do not know whether I do or not. [258]

Mr. McCarthy: May it please the Court, directing the Court's attention to the Riley case, there is

no possible way in which the complaint in this action can be changed into a Riley case one. The Riley case is the case decided by the Supreme Court of New Hampshire, to which counsel has referred. In this case the union, as in the case before your Honor, were saying, "We are not under this Act." Precisely it means, "You are not engaged in business under the contract which affects interstate commerce." That is the position which the employer says in his complaint this union takes. The employer says: "No, you are under the act. We are engaged in business in which a labor dispute would affect interstate commerce; therefore we are under the act and you must behave accordingly." They argue the Riley case. In the Riley case both the union and the employer conceded that they were wholly engaged in interstate commerce. The factual issue which the Board has to decide, namely, affecting interstate commerce, that factual issue which exists in the case before your Honor, was conceded in the Riley case. The court said:

"It is the position of the petitioners that the Labor Management Relations Act of 1947, 29 U.S.C.A., Sec. 141 et seq., supersedes the provisions of Laws of 1947, Chapter 195, so far as the provisions thereof are applicable to the business engaged in by your petitioners and the defendant Joseph [259] E. Faltin, which is conceded to be wholly interstate commerce, * * *"

In other words, in the Riley case the union and the employer said to the court: "This business is in interstate commerce. We have a State act and the Supreme Court has the federal act. We have a

State act which says you can only have a union shop under this condition, that condition and the other condition. We have the Labor Management Relations Act, which says you can have a union shop under different conditions provided for by the State constitution where we are in interstate commerce. We have conceded that as an admitted fact, so please tell us if we are in interstate commerce whether the State act supersedes the federal act or the federal act supersedes the State act," which was a very simple proposition. The court there simply said, "If you are in interstate commerce, as you agree, obviously the federal act applies." What is our situation here? Our situation here is that the union says we are not in interstate commerce and counsel just said that one of the things they wanted to do was put evidence in here through witnesses to prove that the union is wrong, so it is not a question of asking your Honor whether the laws of the State of Nevada apply or the federal act, it is a question of asking your Honor to make a basic decision that the Board has to make, and in that respect it is best to go back to the statute, even if it takes just a little while, and get this thing clear once [260] and for all, because counsel has ignored one feature of the Board. The Board not only hears unfair labor practices cases but holds elections. One of the allegations in this complaint is that this union will not agree to have the Board hold an election in order to determine whether or not it can have union security clause, and the charge is definite in the complaint. The union says we won't agree to that because we are not in commerce, we do not affect commerce; at

least, that is the allegation of the complaint. It is not of any moment what the truth is, that is the complaint. So what happens? We go to Section 9(a) of the Act. You will find it, your Honor, at page 102 of that pamphlet which I think your Honor has there, the little green-covered pamphlet: Section 9(a) says:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, * * *"

I want your Honor to remember those words—"in a unit appropriate for such purposes":

"* * * shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *"

So first you have to have this representative not only represent a majority, but it must represent a majority in a unit. All right. Now when we come to the question of unit, now in [261] Section 9(b):

"The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *"

So now the Board must make a determination as to whether these unions should bargain with this plaintiff employer association or with the employers individually, and the Board has to make that decision. That is the unit. Nobody else can make it but the Board. They then say:

"* * * Provided, That the Board shall not (1) decide that any unit is appropriate for such pur-

poses if such unit includes both professional employees and employees who are not professional employees, unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce [262] against employees and other persons rules to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

So in other words, the Board's power to determine the unit is limited. Now if the union says, "We take guards into membership" and bargains for the guards, to that extent the Board itself would have to limit that union's power under this section.

Now following that what happens?

"Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board——"

Now who can file this petition?

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of

employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified [263] or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a); * * *"

Then the next one:

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); * * *"

Alleging that various claims are made. What happens when that is done?

"* * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice."

Now what is "affecting commerce"? The definition of that is in the Act and it is very simple:

"The term 'affecting commerce' means in commerce, or burdening or abstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

In other words, this Board, before it can even hold a hearing to determine what the unit is, whether there should be an election, must first find whether or not a labor dispute between those parties would burden commerce. [264]

Now why have I gone to such length there? I have for this reason—this complaint alleges that this union will not have a vote on the question of its right to enter into a union shop contract. Now the union alone can petition for that vote. The employer can not. Here on page 104, sub-section (e):

"Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), * * *"

You recall, your Honor, that I mentioned 9(a) in the unit:

"* * * of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes * * *"

Now we have the union again. In other words, the union must file a petition claiming that thirty per cent of the employees in an appropriate unit want a union shop. Otherwise you can't get an election, but the Board has no authority to find an appropriate unit unless a dispute in that unit would affect interstate commerce, and then in addition it must decide whether that unit is one employer or many employers, so that just take what would happen, assuming that your Honor should make a ruling to the effect that these people are engaged in a business in which a labor dispute would obstruct commerce and therefore the National Labor Relations Act applies. This union sits down and says, "Thanks, we won't [265] file any petition. We are not going to ask the Board for a union shop election. We are just not going to do anything." So what happens? It is a nullity and it has never been a practice in district courts of the United

States to do useless acts. It is an absolute nullity because the union has within its power, under this Act, the right to file that petition or refuse to file it. There is nothing in here that requires the union to file it. Unless the union can persuade thirty per cent of the men working in the shop to sign a card individually authorizing the union, they can't even file the petition, and that is in the Act itself:

"Upon the filing with the Board by a labor organization, which is the representative of employees as provided in Section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer."

And the proper showing—Mr. Penfield will confirm my statement— [266] is a written signed document by the individual man, saying that he desires to have his union authorized to write a union shop. If thirty per cent of the people refuse to sign it, the union could not even file the petition, so a completely useless act is the net result, because your Honor could not order this union to coerce these men into signing those cards, because that is an unfair labor practice. Those men must sign those

cards freely and voluntarily and of their own free will and if there is any coercion by the union you would have an unfair labor practice. It is forbidden by the Act. Now that being the case, the act that your Honor is being asked to do would be a complete nullity.

But let us take the other practice that has been discussed. I do not think there is any appeal to any court from the Board's decision on the question of a union shop election. There is no appeal provided for in the Act. That is a final, permanent administrative decision. The only way you can appeal that is to bring an unfair labor practice charge, based upon some act done as a result of the Board's action. In other words, if the Board said, "We will not hold the election because you do not affect commerce," there is no appeal from that decision. The employer, however, or the union, could charge an unfair labor practice. That record would become a part of the record of the unfair labor practice action and it is then appealable to the Circuit Court, but on [267] the question of this union shop election there is no appeal, so what can happen is this—your Honor could find they are under the Act, order an election, the Board says "We won't have it," and the Board has the last say and there is no appeal from it. Obviously this decision here could not be pleaded as res adjudicata before the Board. It has the right to make its own decision. Who has rights under unfair labor charge? The employer has rights to file it, the individual employee has rights, and the union has a right. Now when an unfair labor practice charge is filed and the Board

decides it has not been committed or it has no jurisdiction and that decision is sustained by the Circuit Court or the Supreme Court, if necessary, that decision is res adjudicata as to the rights of employer, employees individually, and the union. No decision by this Court is going to be binding upon the individual man who may, if he wishes, file an unfair labor practice charge in his own right under this Act and ask for relief as an individual, because he is not before your Honor. He just isn't here. And secondly, even under counsel's theory, you couldn't do it, so what we have here is this—the Complaint recites very clearly that this union has refused to bargain in good faith, because it insisted upon the inclusion of a union shop clause, which employer says they are not entitled to have unless they hold an election, but which the union says they do not need an election because they [268] are not in an industry in which a labor dispute will adversely affect interstate commerce, so they are in here asking your Honor to determine the basic question of the Board's jurisdiction. The Board, as your Honor can see from the sections we have referred to, has no jurisdiction unless there are reasonable grounds to believe that a labor dispute would adversely affect interstate commerce. Now in the Riley case the parties conceded that a labor dispute would adversely affect interstate commerce. They said the business was in interstate commerce and "we want to know therefore whether the State act or the federal act applies." Now take counsel's request—"are we covered by the federal act or a State act?" I think your Honor can an-

swer it, but I do not think it is going to be beneficial to the parties. Your Honor can say: "If the petitioner in this case and the employers the petitioner represents, are engaged in a business in which a labor dispute would substantially and adversely affect interstate commerce within the meaning of the Labor Management Relations Act, then you are subject to it, but if you are not engaged in such business, then you are subject to the State law. The determination of that question of fact has by Congress been placed in the National Labor Relations Board.

Mr. Brown: Excuse me, your Honor, but may I ask through the court, the last statement of counsel, by what right Congress has exclusive power to authorize the National [269] Labor Relations Board to determine that?

Mr. McCarthy: Under Section 9(e), page 104, a union shop election can only be held in an appropriate unit. By Section 9(c), the board shall determine the appropriate unit only when a question of representation affecting commerce exists. So, therefore, they must determine whether a question affecting commerce exists. Affecting commerce is defined by the Act to be:

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

So, therefore, the Board must hold a hearing and find out whether or not a labor dispute will affect commerce if it occurs in this industry, before it

can determine the unit, and it must determine the unit before it can order a union shop election, so it essentially has to determine whether or not it obstructs or will affect commerce. In addition to that, the Board must also decide whether or not communist affidavits have been filed and whether or not other reports have been filed, and if they have not been filed, the Board has no authority to direct the holding of a union shop election. None at all. It is without jurisdiction. Now here is what it says: [270]

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed * * *" and so on and so forth. So they would ask your Honor to determine a question which Congress has said not even the Board can determine unless these affidavits are on file, and there is no allegation in the complaint that these affidavits required by Congress have been filed by these unions, or these reports have been made and it is immaterial whether they have or they haven't. We have to rely on the complaint.

Now in addition to that, what has been the right of Congress to enact this legislation at all? Congress can only enact legislation of this sort in the exercise of its commerce power. It is not incumbent

upon Congress to decide, but Congress came very close to that. They made a statement of policy at the very beginning of this act, at page 95:

"Industrial strift which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

The Court: May I ask you a question? Suppose a contract is negotiated between one or all of the [272] unions involved in this case, providing for a closed shop, and the contention of the plaintiffs—

I don't know how they would make such a contract if they felt it was illegal——

Mr. McCarthy: I will put it this way—if demand was made upon plaintiffs to enter into that agreement but refused, and the union went on strike, the National Labor Relations Board says they come to the Board, that the Board makes an investigation, if the Board has reasonable grounds to believe that this is in violation of the Act, the Board is entitled to come into this court and get an injunction and proceed against it.

The Court: Here might be one of Mr. Brown's ideas. Suppose representatives of both sides, employers and unions, were ready to sit down and stipulate and execute a contract. Suppose the employers here were willing and anxious to enter into a contract that would provide for a closed shop. They are not disposed at all to refuse to agree to a closed shop. Now aren't they in a position where they might be fearful they might be violating some term of the Taft-Hartley law?

Mr. McCarthy: That is absolutely true. That is their position, but isn't it true they may be fearful of it and if they entered into the agreement and if, in fact, it was a violation, both the union and the employer would be responsible [273] to any individual employee who was guilty by reason of that agreement. In other words, if a man was told he had to get off the job because you are not a member of the union——

The Court: Would that leave the contracting parties, employee, the employer and labor organi-

zation, or either one of them, subject to an action for damages?

Mr. McCarthy: Yes, your Honor, no question, an action for damages subject to a proceeding before the Board, but the employer does not get into that position because he says, "I won't sign the agreement." That is his right.

The Court: Yes, but we don't know whether he is going to or not.

Mr. McCarthy: If he says, "I won't sign it"——

The Court: Are we in this position, Mr. McCarthy, here—at the outset we have no indication from this complaint, or any utterance of the employers, that they will refuse to sign a closed shop contract.

Mr. McCarthy: I am sorry, sir, we have the complaint which clearly states that is what brought on this issue, that the employer has refused. They go into it in detail.

Mr. Brown: Only on the basis we would be liable, if we did it——

Mr. McCarthy: Paragraph V, page 6, they recited in detail:

"That it was the opinion of the Reno Employers [274] Council after advice given by legal counsel, that the Labor Management Relations Act of 1947 prevented the continuation of the master agreement beyond May 21, 1948, without a revision of the union security provision of said contract as required by said Labor Management Relations Act of 1947. Whereupon petitioner did notify the unions and the Council, respondents herein, that in its opinion the respective unions should immediately

take steps to comply with the Labor Management Relations Act of 1947 by filing the necessary petitions so that proper elections should be held prior to May 21, 1948, for the purpose of securing proper authority to request union security provision in their working agreement. That thereafter and during said negotiations your petitioner took the position in such negotiations that the master agreement could not be continued after the date, May 21, 1948, without compliance with Section 8 A I of the Labor Management Relations Act of 1947, the same being Chapter 120, Public Law 101, which requires an election and affirmative vote of the employees on the question whether union membership be made a condition of employment."

Then it goes on:

> "* * * but that it was their belief * * *" [275] meaning the Building Trades Council:
>
> "* * * that the Reno Building Trades Council and the construction industry in the area of California and Nevada aforesaid was not covered by the provisions of said Act * * *"

That issue was squarely put up to the employer and according to the Act what the employer is supposed to do, instead of coming in here prior to the 21st, was to have gone to Mr. Penfield's office and charged these unions with an unfair labor practice and if there is no question that affects interstate commerce, the Board then is given by Congress power to come in and obtain an injunction until the Board decides the entire matter, and

that is specifically provided for in the Act and that is why we say there has been no exhaustion of their——

The Court (interrupting): Read that statement again. We have the statement in the complaint that in the opinion of the Reno Employers Council that the Labor Management Relations Act prevented the continuation of the closed shop agreement. That is what it means.

Mr. McCarthy: The union said, "No, it didn't and you sign a closed shop agreement or we will strike," that is what the complaint says.

The Court: Before that strike took place, would there be any relief that the employers could obtain under [276] the Taft-Hartley law?

Mr. McCarthy: Very definitely, and here it is, your Honor. In fact, it is one of the provisions of the Taft-Hartley law the unions dislike very strenuously. Here it is:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

The Court: The act of the unions in declaring that unless there was a closed shop contract they would strike, that would be an unfair labor practice.

Mr. McCarthy: No question about that. Union unfair labor practice:

"It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this para-

graph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to [277] discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing [278] or requiring any other

employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; * * *"

Mr. Penfield: Pardon the interruption. To assist your Honor I might add that was exactly the issue in the case now pending before the Board which involves John L. Lewis and his Mine Workers. John L. Lewis was insisting that they sign the provisional closed shop agreement. The employers took the position that because of the Taft-Hartley Act they could not sign it, they were prohibited from doing so. Lewis refused to give on that position and the employers charged Lewis with seeking to impose an illegal condition on bargaining and attempting to cause them, the employers, to discriminate against employees by signing such agreement. The Board issued a complaint charging Lewis, went into the district court and sought injunction against a strike, which was issued by Judge Goldsborough, although later the judge got the parties together and they did sign an agreement, the [279] understanding being this was a new field of law, maybe not entirely clear as to whether these things were or were not violations and therefore it would be carried on through these states, so it was decided by competent court. That is in the process

of being done. The Board has held a hearing, but that is the way when an issue comes up it is gotten before the Board.

The Court: Then in this case here if the employers were fearful of entering into a closed shop contract, the unions insisted upon it and strike was impending or threatened, the employer here could file a complaint with the National Labor Relations Board, alleging an unfair labor practice and then if the unions wanted to meet that issue on the question of jurisdiction, they could come in and say that they were not engaged in any industry affecting interstate commerce.

Mr. Penfield: That would be the first thing that we consider. If our ruling was no, that would end the proposition right there.

The Court: That may be said to be your thought in regard to this particular case?

Mr. Penfield: That is correct.

Mr. McCarthy: I might add, your Honor may have read the decision with respect to the hiring laws in the Atlantic case. There the employer said, "We won't sign the [280] contract." The Board got an injunction restraining the men from striking and went on to consider that the hiring laws were improper. The matter is before the court but injunction is still in effect.

Mr. Penfield: Correction. They did not get an injunction. The Board did not get an injunction. That was the other one which comes up under the emergency provisions. However, the matter was rejected. The Board has now issued its decision. It

is now going on up through the Circuit Court. We are at the present time engaged in a trial on the same issue, on hiring laws, in San Francisco.

Mr. McCarthy: The Act specifies, at page 108:

"The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall [281] have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

Then they say following that subdivision (1) section, which has to do with jurisdictional disputes:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. * * *"

And that is this. This is one of those charges:

"* * * If, after such investigation, the officer or regional attorney to whom the matter may be re-

ferred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunction relief pending the final [282] adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of the law."

In other words, it wipes out the Norris-LaGuardia Act insofar as the use of this power is concerned. As a matter of fact, in section (h) they did not take any chances. They said:

"When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932."

And that was done and the reason for it is obvious. It was to take out of the hands of private litigants the enforcement of a public act, which is the basis of the Gerry case and the rest of it. In

other words, the Board in this case acts very much as a district attorney does. You come in, make your complaint, [283] it goes to the grand jury, and the man is indicted. Here you come in, make your complaint, the Board investigates it, if it has reasonable cause to believe—this same test the grand jury gives—that an unfair labor practice has been committed or is about to be committed, it goes into the district court, and incidentally in that case the court does not have to find any of these jurisdictional facts in issue here. All the court has to find is that the Board had reasonable cause to believe that commerce would be affected and the very last case that is the exact finding which is made by the district court in Illinois. In that case the United Packing House Workers of America against Wilson, 2297, decided May 11, 1948, this is exactly the finding:

"The act expressly confers jurisdiction in Section 10(j) to grant temporary injunctions upon application of the Board, after the latter has issued a complaint charging an unfair labor practice."

This was the case in which they held that they did not have jurisdiction at the suit of a private individual, but there is one other thing here in which—I thought I brought it over here and I wanted to read it—no, I didn't bring it over—in which they make the direct finding that the Board had reasonable cause to believe rather than making a finding of fact that they were engaged in interstate commerce, or that the dispute would affect it.

So that, insofar as jurisdiction is concerned, the situation is this: Your Honor, I think, can clearly

see the unholy mess that we would all be in if an administrative board, from which under certain circumstances there is no appeal, should decide one way and the district court should decide another way an the administrative board, which under certain circumstances can get injunctions or refuse to get injunctions, because let us trace exactly what can happen. Your Honor declares, we will say, as counsel has requested, and says these unions are engaged in a busines which affects interstate commerce. We will say that you should make such a finding. Therefore, as a conclusion of law, they are subject to the Labor Management Relations Act. What kind of a judgment is your Honor going to enter, going to direct us to do something? No, just going to advise us. Right now we have been advised. We sit back and do nothing. We say, "Thank you very much." What happens? We say, "Mr. Employer, either you write a closed shop contract or you do not get any work done," so what does the employer do? He has to go to the National Labor Relations Board and your Honor's finding is of no moment, means nothing. So the Board makes an investigation and it says, "In the first place, Mr. Employer, your unit is wrong. We can't accept your charge because you want to deal with this union in this fashion [285] and it is making the demand in the other fashion and the unit in which it is making the demand is the appropriate unit. You have no charge. We haven't committed a wrong because we have to make the demand in the appropriate unit, so there is nothing happens to that one.

Then again the Board makes an investigation and comes to the conclusion that interstate commerce is not affected substantially so as to bring the act into play, and incidentally, this is one such finding by a trial examiner recently, so the Board says, "No, no unfair labor practice," so we continue to strike the job, in the face of a finding that we are under the act.

Now fundamentally the Supreme Court, in the Wagshal case, went way out of its way—it is in the brief submitted by the government—but the important thing in that case is that it is not often that the United States Supreme Court deliberately goes out of its way, to use a colloquialism, to "touch off the dynamite" and state as to what it thinks is the proper thing to do under certain circumstances, but they did it in that case, and it is very easy to see why they did it. In the Wagshal case the court said this:

"A preliminary claim must be met, that the case has become moot. The short answer to the argument that the Labor Management Relations Act of 1947, 61 Stat. 136, 149, Sec. 10(h), has removed the limtations of the Norris-LaGuardia Act upon the [286] power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where the proceedings are instituted by a private party."

Now when the Supreme Court went out of its way to make that statement, I have no doubt it was the primary factor that influenced the Supreme

Court of the State of California in the Gerry case and fundamentally in that case all they decided was that the suit of a private party would have no power and jurisdictionally that is the only conclusion we can come to.

Mr. Griswold: May it please the Court, may I make just a little different statement of facts. Let us say that your Honor should give what the petitioners ask, that is a determination of the question of whether this is interstate or intra-state commerce. First, it would have to be done after lengthy hearings on the character of each of the crafts and the contractors, because both the character of the contractor and the crafts enters into it. Now after that was done, let us say in place of saying that we want a closed shop, let the unions or the employers say, "Well, we are perfectly satisfied with conditions as they are. We do not want anything." We have what they denominate a stipulation that I have tried several times this morning to get in here—they say a stipulation, which I say is a contract, and it has all [287] the terms of a contract, in that wages and hours, working conditions and termination period of one year up to next May is in this contract. So they simply say, the unions say, "There is nothing we want done. Thank you, your Honor, that is the decision, but we are not interested in it." So it goes along to next year. The same question comes up. Let us say that at that time there has been some determination of it by other courts, so the unions call upon the employer for a closed shop. At that time the employer comes

into the National Labor Relations Board on an unfair labor practice, and that is the only place he can come. The National Labor Relations Board then, through its machinery, immediately makes the investigation as has been outlined by counsel and they come to various and other opinions in contrast to what your Honor has done. Now declaratory judgments do not act as advice or in an advisory capacity. There must be a legal right before the court can have jurisdiction and a legal right that can be determined. Now, your Honor, I can not see where any decision that might be given it would make one iota of difference, insofar as the relief of the parties are concerned in the event either party determined to go to the National Labor Relations Board. Either party could go. So I see no reason for your Honor just writing an opinion, a decision, in this matter, where the proper tribunal, and the tribunal that just have the jurisdiction and retains and maintains that [288] jurisdiction to hear these matters before your Honor can step in is the National Labor Relations Board. So there is no use doing a thing in this matter. Let us go into the proper administrative tribunal,—they will handle this—that we can get our teeth into.

Mr. Brown: May it please the Court, I know the time is getting late. We have cited here a large number of cases—this Bakery Drivers case, the Gerry of California case read at length, all by Mr. McCarthy this morning. Only one of those cases, may it please the Court, indicated that in view of the Norris-LaGuardia Act private parties have no

right to go into court and obtain an injunction, and why is that? That is because of another act of Congress, the Norris-LaGuardia act, which restricts the jurisdiction of federal courts in the matter of injunctive remedies except in certain instances. Now prior to the amendment of the Wagner Act, the Supreme Court of the United States held that insofar as it prevents unfair labor practices, the Board had exclusive jurisdiction. Now how was that matter presented to the federal courts? It was presented in view of that exclusive provision in section 10 of the old Wagner Act, saying the Board had exclusive jurisdiction, it was presented to the Courts of the United States through application for injunctive relief. Now when the act was amended in 1947 by the Taft-Hartley Act, it provided in addition that the Board is empowered, as hereinafter provided, [289] to prevent any person from engaging in any unfair labor practice listed in section 8, affecting commerce. This reverses the old Congressional theory of section 10, because the new Congress, the 80th Congress, added this:

"This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise;——"

Now in that same section, where the Board is given power to seek out injunctions, we find in section 10(h) in the Taft-Hartley Act expressly uses this language:

"When granting appropriate temporary relief or a restraining order, or making and entering a

decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (U.S.C. Supp. VII, title 29 secs. 101-115)."

That is the Norris-LaGuardia act, but, may it please the Court, when Congress in 1947, in view of the fact that the Board had excusive jurisdiction to prevent unfair labor practices, [290] took out the word "exclusive" and added that this power should not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise, Congress at that time knew that in 1934 the United States Congress had passed a declaratory judgment act, section 400, Title 28, and if they had intended to say that the district courts of the United States were not able to adjudicate controversies which they have adjudicated in the past under the declaratory judgment act, wouldn't apply if it simply involved a case as we find in the New Hampshire matter, we submit they would have said so, but they did not, and the reason for the amendment to Section 10(a) was to avoid and to prevent unfair labor practices by other means provided by law, which is the proposition presented to this Court, asking for declaratory judgment to prevent an unfair labor practice. If a man has a 99-year lease, having cer-

tain clauses which he feels, before he should execute that lease, should be determined and there is an actual controversy and he comes in and asks for a declaratory judgment, as we have done in State, in federal courts time and time again, then he has his rights adjudicated and the other party does in respect to that particular concrete factual situation, which enables him to prevent the necessity of damages.

Now reading from Duvall's article, just one thing:

"The concept of a government of laws and [291] not of men is a highly developed social accomplishment. The function of the judicial branch in modern society is a long step from enforcement of an individual's rights by his own might or the later trial by combat."

Then he speaks about the declaratory judgments:

"So, too, is the declaratory action a very much more civilized procedure than action for redress of violated rights. Its purpose is to provide a speedy adjudication of the legal rights, duties or status of the parties before 'dishes are broken', i.e., before there has been a breach of 'rights' or the commission of a 'wrong'."

If we know, from a decision under a declaratory judgment in this matter, that under the particular facts that ultimately arise as issue after the filing of an answer in this case by the respondents, that we are engaged in interstate commerce, or the in-

dustry as set forth in those issues affect interstate commerce as defined in the Taft-Hartley Act, then any negotiations and bargaining contracts entered into between both the union and the employers will prevent unfair labor practices and will shorten the duties, rights, and status of the parties before "the dishes are broken" and before there is a breach of rights or the commission of a wrong. Now that is our theory, may it please the Court, and we respectfully [292] suggest if the Court would desire, we would be willing, if we can be of any help, to submit additional briefs points and authorities.

The Court: This argument was addressed to the motion of the National Labor Relations Board to dismiss the complaint, the Board having heretofore been, pursuant to stipulation of the parties, permitted to intervene.

The motion is based upon the question of the Court's jurisdiction to consider the subject matter of this complaint. Three points are urged:

"(a) The amended National Labor Relations Act vests the National Labor Relations Board with exclusive initial jurisdiction of matters involving unfair labor practices.

"(b) The federal district courts do not have jurisdiction, at the suit of private parties, to determine whether the operations of employers and labor organizations affect commerce within the meaning of the amended National Labor Relations Act, to determine whether unfair labor practices within the meaning of the Act have been committed, or

to remedy, by injunction or otherwise, unfair labor practices. The jurisdiction of the federal district courts over unfair labor practices has been expressly limited by Sections 10(j) and [293] 10(l) of the amended National Labor Relations Act to those situations where the Board, or an officer or regional attorney thereof, petitions such courts for preliminary injunctive relief, pending a determination by the Board as to whether unfair labor practices have been committed.

"(c) Plaintiff has failed to exhaust its administrative remedy under the provisions of the amended National Labor Relations Act."

Now the purpose of this section is to determine whether or not the defendants, or any of them, are subject to the Act, which is commonly called the Taft-Hartley Act. To be subject to that Act it would be necessary that they were engaged in activities having to do with interstate commerce, affecting interstate commerce.

The complaint sets up a situation that indicates there is some doubt in the minds of the plaintiffs, the California Association of Employers, as to their power or authority for the execution of an agreement that might be made on the closed shop basis. They seem to be fearful of complications arising from an execution of such an agreement, and then also, as pointed out by counsel to the Court, the complaint, in paragraph 5, indicates that the employers will not enter into a [294] contract on a closed shop basis.

The whole question resolves itself around the point as to whether or not the unions here are engaged in interstate commerce. This Court might hold that they were, after a hearing. Another court in San Francisco, under the same set of facts—I suppose there are some California groups connected with the companies here—they might bring an action of the same type engaged in the same industries, and they might get a decision in the district court in Sacramento or San Francisco contrary to the decision that this court might give. There would be appeals to the Circuit Court of Appeals in both cases. That might go on all over the Circuit and continue throughout the United States and I think the statement that was made in the Amazon Cotton Mill Co. vs. Textile Workers Union, 167 Federal (2), 183, on page 186, where the Circuit Court goes on to state:

"It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of the act was 'to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining'; [295] that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined."

I think we can go a little farther and say it is the intention of Congress to establish an administrative body to determine those questions of unfair labor practices and also the question of jurisdiction under the Act.

I think it is conceded that the National Labor Relations Board has the jurisdiction to determine whether or not these unions are subject to the Taft-Hartley law. It may be that this court also has jurisdiction. I do not think that is a controlling point. Assuming that this court has jurisdiction under the declaratory judgment law, I do not think that the court should exercise such jurisdiction. I think there is some discretion that should be exercised under that declaratory judgment law. This would be a case where the court steps in before an administrative body, created primarily and specifically for the purpose of deciding such questions has an opportunity to act.

It is up to the administrative body, and the [296] motion to dismiss the complaint is granted upon all the grounds urged in the motion. [297]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings in the case entitled, California Association of Employers, Petitioner,

vs. Building and Construction Trades Council of Reno, Nevada and Vicinity, et al, No. 700, at the hearing held in Carson City, Nevada, on September 16, 1948, and that the foregoing pages, numbered 1 to 124 inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, November 15, 1948.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed Dec, 21, 1948. [298]

In the District Court of the United States of America, in and for the District of Nevada

No. 700—Civil

CALIFORNIA ASSOCIATION OF EMPLOYERS, a California Corporation, doing business under the firm name and style of RENO EMPLOYERS COUNCIL,

Petitioner,

vs.

BUILDING AND CONSTRUCTION TRADES COUNCIL, OF RENO, NEVADA AND VICINITY, Etc.

Respondents.

FINAL JUDGMENT

In this action it appearing from the record that the defendants above named were regularly served with process herein, and thereafter the National

Labor Relations Board filed a Motion to Intervene herein and were by stipulation of the parties permitted to intervene herein, and that said defendants and the Intervenor did file a Motion to Dismiss the Complaint of plaintiff on file herein, and the Motion of the National Labor Relations Board to so dismiss the complaint having come regularly before the Court on the 16th day of September, 1948, for argument, and said Motion to Dismiss the Complaint having been granted upon all the grounds urged in the motion;

It is hereby ordered and adjudged that the said plaintiff take nothing by reason of its Complaint as to the defendants, or any of them, and petitioner's complaint be and hereby is dismissed; that defendants be allowed their costs as provided by law.

Judgment rendered October 18th, 1948.

/s/ ROGER T. FOLEY,
District Judge.

[Endorsed]: Filed Oct. 18, 1948. [300]

[Title of District Court and Cause.]

DECISION OF THE COURT ON MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO DISMISS THE COMPLAINT.

The Court: This argument was addressed to the motion of the National Labor Relations Board to dismiss the complaint, the Board having heretofore been, pursuant to stipulation of the parties, permitted to intervene.

The motion is based upon the question of the court's jurisdiction to consider the subject matter of this complaint. Three points are urged:

"(a) The amended National Labor Relations Act vests the National Labor Relations Board with exclusive initial jurisdiction of matters involving unfair labor practices.

"(b) The federal district courts do not have jurisdiction, at the suit of private parties, to determine whether the operations of employers and labor organizations affect commerce within the meaning of [301] the amended National Labor Relations Act, to determine whether unfair labor practices within the meaning of the Act have been committed, or to remedy, by injunction or otherwise, unfair labor practices. The jurisdiction of the federal district courts over unfair labor practices has been expressly limited by Sections 10(j) and 10(l) of the amended National Labor Relations Act to those situations where the Board, or an officer or regional attorney thereof, petitions such courts for preliminary injunctive relief, pending a determination by the Board as to whether unfair labor practices have been committed.

"(c) Plaintiff has failed to exhaust its administrative remedy under the provisions of the amended National Labor Relations Act."

Now the purpose of this action is to determine whether or not the defendants, or any of them, are subject to the Act, which is commonly called the Taft-Hartley Act. To be subject to that Act it would be necessary that they were engaged in ac-

tivities having to do with interstate commerce, affecting interstate commerce.

The complaint sets up a situation that indicates there is some doubt in the minds of the plaintiffs, the California Association of Employers, as to their power or authority for the execution of an agreement that might be made on the closed shop basis. They seem to be fearful of complications arising from an execution of such an agreement, and then also, as pointed out by counsel to the Court, the complaint, in paragraph 5, indicates that the employers will not enter into a contract on a closed shop basis.

The whole question resolves itself around the point as to [302] whether or not the unions here are engaged in interstate commerce. This Court might hold they were, after a hearing. Another Court in San Francisco, under the same set of facts —I suppose there are some California groups connected with the companies here—they might bring an action of the same type engaged in the same industries, and they might get a decision in the district court in Sacramento or San Francisco contrary to the decision that this Court might give. There would be appeals to the Circuit Court of Appeals in both cases. That might go on all over the Circuit and continue throughout the United States and I think the statement that was made in the Amazon Cotton Mill Co. vs. Textile Workers Union, 167 Federal (2) 183, on page 186, where the Circuit Court goes on to state:—

"It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of the act was 'to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining'; that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined."

I think we can go a little farther and say it is the intention of Congress to establish an administrative body to determine those questions of unfair labor practices and also the question of jurisdiction under the Act.

I think it is conceded that the National Labor Relations [303] Board has the jurisdiction to determine whether or not these unions are subject to the Taft-Hartley law. It may be that this court also has jurisdiction. I do not think that is a controlling point. Assuming that this court has jurisdiction under the declaratory judgment law, I do not think that the court should exercise such jurisdiction. I think there is some discretion that should be exercised under that declaratory judgment law. This would be a case where the court steps in before an administrative body, created primarily and specifically for the purpose of deciding such questions has an opportunity to act.

It is up to the administrative body and the motion to dismiss the complaint is granted upon all the grounds urged in the motion. [304]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceeding had at hearings on Motion of the National Labor Relations Board to Dismiss the Complaint in the foregoing entitled action, No. 700, held in Carson City, Nevada, on September 16, 1948, and that the foregoing pages, numbered 1 to 5, inclusive, comprise a full, true and correct transcript of my said shorthand notes of the decision of the court, to the best of my knowledge and ability.

Dated at Carson City, Nevada, September 16, 1948.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed September 17, 1948. [305]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS

Notice is hereby given that California Association of Employers, a California Corporation, doing business under the firm name and style of Reno Employers Council, Plaintiff above named, hereby ap-

peals to the Circuit Court of Appeals for the Ninth Circuit from the Final Judgment and every part thereof entered in this action on the 16th day of September, 1948.

/s/ BROWN & WELLS
By /s/ ERNEST S. BROWN,
Attorneys for Appellants
and

THEODORE HAUGH,

[Endorsed]: Filed Oct. 15, 1948. [308]

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, petition in the above entitled action has appealed to the Circuit Court of Appeals of the United States, Ninth Circuit, from a judgment entered against it in said action in the District Court of United States in and for the District of Nevada, in favor of defendants, and against petitioner, dismissing said action on the 16th day of September, 1948.

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, the Hartford Accident and Indemnity Company, a corporation qualified to do business in the State of Nevada, and the plaintiff or petitioner herein, do hereby jointly and severally undertake and promise, on the part of the petitioner, appellant, that the said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dis-

missal thereof, not exceeding two hundred and fifty dollars ($250.00), to which amount we acknowledge ourselves jointly and severally bound.

Dated, this 15th day of October, 1948.

CALIFORNIA ASSOCIATION OF EMPLOYERS, a California Corporation, doing business under the firm name and style of RENO EMPLOYERS COUNCIL

By /s/ BERNARD HARTUNG, Agent
Principal

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation

By /s/ J. E. SLINGERLAND,
Attorney in Fact.

[Seal]
(Corporate Seal)

State of Nevada,
County of Washoe—ss.

On this 15 day of October, A.D., 1948, personally appeared before me, a Notary Public in and for Washoe County, State of Nevada, J. E. Slingerland, Attorney in Fact, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of Hartford Accident and Indemnity Company and acknowledged that he subscribed the name of said Hartford Accident and Indemnity Company thereto as Principal, and his own name as attorney in fact freely and voluntarily for the uses and purposes therein mentioned; that said J. E. Slingerland, is known to me to be the attorney-in-fact duly authorized to execute the

same on behalf of said Hartford Accident and Indemnity Company, a corporation, and said J. E. Slingerland, upon his oath did depose that he is the attorney-in-fact for said corporation as above designated; that he is acquainted with the seal of said corporation and that the seal affixed to said instrument is the corporate seal of said corporation; and that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the county aforesaid, the day and year in this certificate first above written.

(Seal) /s/ WYMAN EVANS,
Notary Public in and for Washoe County, Nevada.

My Commission Expires: April 22, 1950.

[Endorsed]: Filed October 15, 1948. [311]

[Title of District Court and Cause.]

NOTICE OF MOTION TO EXTEND TIME FOR FILING RECORD ON APPEAL

Notice is hereby given that California Association of Employers, doing business under the firm name and style of Reno Employers Council, plaintiff above named, will on the 22nd day of October, 1948, move that the District Court of the United States

in and for the District of Nevada extend the time for filing the record on appeal from forty (40) days to seventy (70) days from the date of filing the notice of appeal.

/s/ BROWN & WELLS

By /s/ A. D. JENSEN,

Attorneys for Petitioner and Appellant

and

THEODORE HAUGH.

[Endorsed]: Filed October 15, 1948. [315]

[Title of District Court and Cause.]

COPY OF MINUTE ORDER OF OCTOBER 26, 1948

Upon Motion of Messrs. Brown & Wells, attorneys for the petitioner and appellant, it is ordered that the time for filing and docketing the record on appeal in the United States Court of Appeals be, and the same hereby is, extended from forty days to seventy days from the date of filing the notice of appeal. [314]

[Title of District Court and Cause.]

COPY OF MINUTE ORDER OF DECEMBER 22, 1948

Upon Motion of Messrs. Brown & Wells, attorneys for the petitioner and appellant, it is ordered that the time for filing and docketing the record on appeal in the U. S. Circuit Court of Appeals be, and the same hereby is, extended to January 13, 1949. [315]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Nevada—ss.

I, Amos P. Dickey, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court of the District of Nevada, including the records, papers and files in the case of California Association of Employers, a California Corporation, doing business under the firm name and style of Reno Employers Council, Petitioner, vs. Building and Construction Trades Council of Reno, Nevada and Vicinity, et al., Respondents, said case being No. 700 on the civil docket of said Court.

I further certify that the attached transcript consisting of 323 typewritten pages numbered from 1 to 323, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing theron, as set forth in the "Designation of Record" filed in said case and made a part of the transcript hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

I further certify that accompanying this record is a copy of "Oral Opinion of the Court Made and Entered May 28, 1948," item No. 5 of appellant's "Designation of Record," said opinion being a copy made from the Reporter's Transcript, filed

June 2, 1948, Hearing on Order to Show Cause held on May 28, 1948. The said writ not having been filed in this office is certified to only as being an excerpt from said Reporter's Transcript. A certified copy of said Reporter's Transcript is made a part of this record.

And I further certify that the cost of preparing and certifying to said record, amounting to $36.50, has been paid to me by Messrs. Brown & Wells, attorneys for the appellant herein.

Witness my hand and the seal of said United States District Court this 7th day of January, 1949.

(Seal) /s/ AMOS P. DICKEY,
Clerk, U. S. District Court.

[Endorsed]: No. 12150. United States Court of Appeals for the Ninth Circuit. California Association of Employers, a California Corporation doing business under the firm name and style of Reno Employers Council, appellant, vs. Building and Construction Trades Council of Reno, Nevada and vicinity, et al., and National Labor Relations Board, appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed January 11, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 12150

CALIFORNIA ASSOCIATION OF EMPLOYERS, A California Corporation, doing business under the firm name and style of RENO EMPLOYERS COUNCIL,

Appellant,

vs.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF RENO, NEVADA AND VICINITY, Etc.,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

Point 1.

The District Court should have issued a preliminary injunction pendente lite as prayed in complaint of plaintiff and filed on the 21st day of May, 1948.

Point 2.

The District Court erred in dismissing the complaint, on motion of the National Labor Relations Board and filed on the 16th day of September, 1948.

/s/ BROWN & WELLS,

By /s/ A. D. JENSEN

Brown & Wells and Theodore Haugh, Attorneys for Appellant.

(Acknowledgment of Service)

[Endorsed]: Filed January 13, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

To: The Clerk of the above-entitled Court:

Pursuant to Rule 19 (6) of the United States Court of Appeals for the Ninth Circuit the following designation of record is hereby made for printing of the record, and necessary for consideration and decision on appeal of the above-entitled cause:

Original Complaint (with Exhibits A, B, C, D, E, and F) filed May 21, 1948.

Order to Show Cause and Temporary Restraining Order filed May 21, 1948.

Motion to Dismiss Order to Show Cause and Restraining Order filed May 28, 1948.

Order Denying the Application for a Preliminary Injunction and Dissolving the Temporary Restraining Order rendered the 28th day of May, 1948, and filed June 2, 1948.

Decision of the Court on Motion for a Preliminary Injunction, rendered May 29, 1948.

Reporter's Transcript on Hearing on Order to Show Cause, filed June 2, 1948.

Motion to Dismiss the Complaint filed by all defendants except Defendant Local Unions of Operating Engineers, No. 3, filed June 7, 1948.

Motion to Dismiss the Complaint as to Operating Engineers Local No. 3, filed June 7, 1948.

Motion of the National Labor Relations Board for Leave to Intervene filed July 2, 1948.

Motion for Order Exonerating Cash Bond, filed July 6, 1948.

Order Exonerating Cash Bond, dated September 17, 1948.

Consent to Intervention of the National Labor Relations Board by defendant dated July 6, 1948, and filed on the 8th day of July, 1948.

Consent to Intervention of the National Labor Relations Board by Plaintiff dated July 13, 1948, and filed July 16, 1948.

Stipulation of Defendant Operating Engineers, Local No. 3, to the Intervention of the National Labor Relations Board, filed August 6, 1948.

Motion to dismiss Complaint filed by all defendants except defendant Local Union of Operating Engineers, No. 3 filed September 7, 1948.

Minute Order Granting the National Labor Relations Board to Intervene.

Motion to Dismiss the Complaint filed by National Labor Relations Board on September 16, 1948.

Reporter's Transcript of Hearing on Motion to Intervene and Motion to Dismiss filed September 17, 1948.

Final Judgment Dismissing the Complaint filed October 18, 1948.

Decision of the Court on Motion of the National Labor Relations Board to Dismiss the Complaint, filed September 17, 1948.

Notice of Appeal to the Ninth Circuit Court of Appeals filed October 15, 1948.

Undertaking on Appeal filed on the 15th day of October, 1948.

Notice of Motion to Extend Time for Filing Record on Appeal filed October 15, 1948.

Order Extending Time for Filing and Docketing The Record on Appeal entered October 26, 1948.

Statement of Points on Which Appellant Intends to Rely on Appeal, filed herein on December 21, 1948.

This Praecipe and service thereon.

Said Transcript to be prepared as required by law and the Rules of Civil Procedure, and to be filed in the office of the Clerk of the Ninth Circuit Court of Appeals on or before the 24th day of December, 1948.

Dated: January 11, 1949.

/s/ BROWN & WELLS,

By /s/ A. D. JENSEN, and
THEODORE HAUGH,
Attorneys for Petitioner and Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed January 13, 1949. Paul P. O'Brien, Clerk.